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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 701

ANGELO QUERCIA, PETITIONER,

vs.

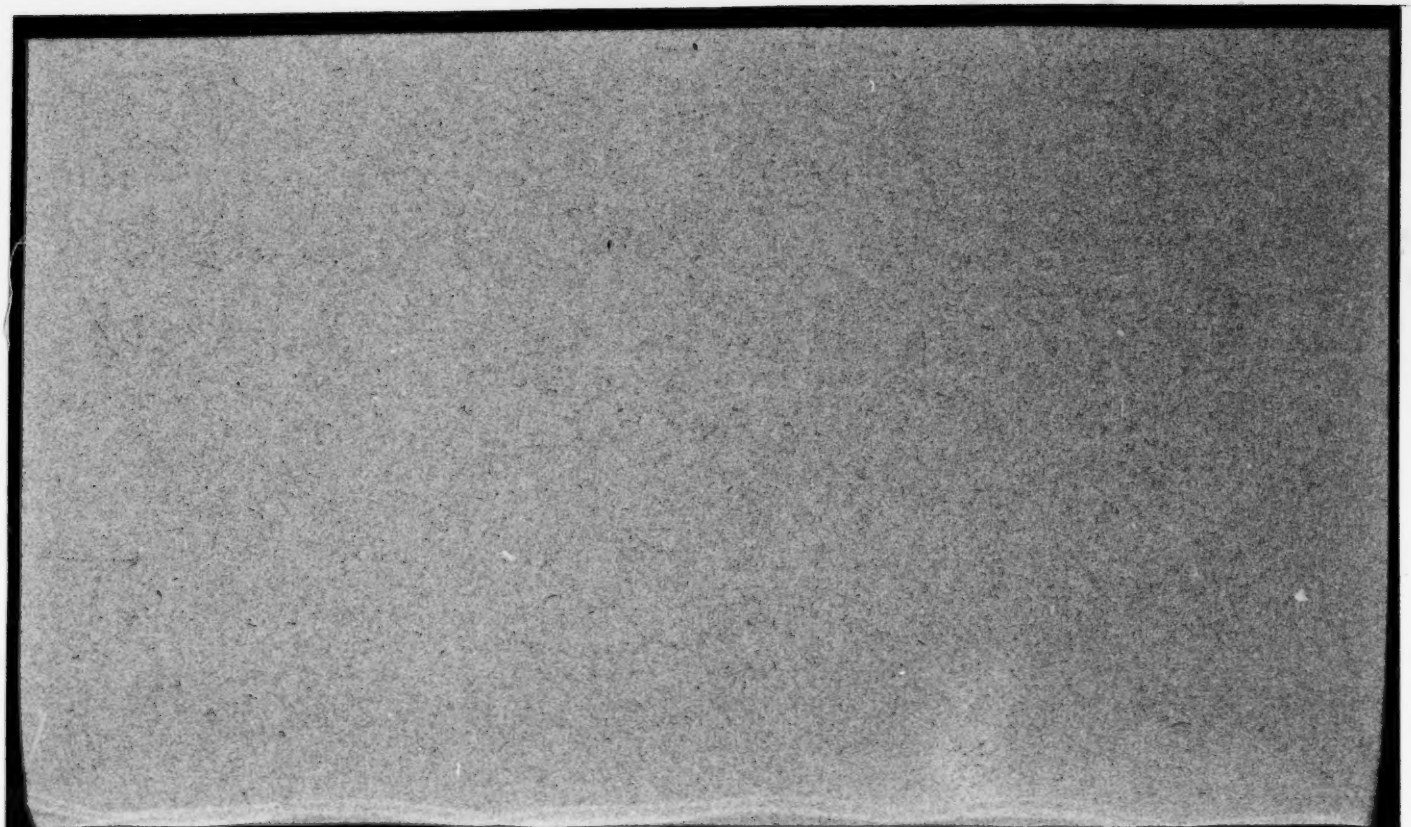
THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 15, 1933

CERTIORARI GRANTED MARCH 27, 1933

(37,398)



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[fols. a-1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 10681, Criminal Docket

UNITED STATES, by Indictment,

v.

JOSEPH A. BROGNA et al.

INDICTMENT

First Count. The Jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that Joseph A. Brogna of Chelsea, in the District of Massachusetts, and Angelo Quercia of Somerville, in the District of Massachusetts, on or about the ninth day of September, in the year one thousand nine hundred and thirty-one, at Somerville, in the District of Massachusetts, did wilfully, knowingly and unlawfully sell, dispense and distribute to one John Hesse of Boston, in the District of Massachusetts, a compound, manufacture, salt, derivative and preparation of opium, to wit, three ounces, more [fol. 2] or less, of morphine, said morphine not being sold, dispensed and distributed in or from an original stamped package.

Second Count. And the Jurors aforesaid, upon their oath aforesaid, do further present that Joseph A. Brogna of Chelsea, in the District of Massachusetts, and Angelo Quercia of Somerville, in the District of Massachusetts, on or about the thirteenth day of September, in the year one thousand nine hundred and thirty-one, at Somerville, in the District of Massachusetts, did wilfully, knowingly and unlawfully sell, dispense and distribute to one John Hesse of Boston, in said District of Massachusetts, a compound, manufacture, salt, derivative and preparation of opium, to wit, two ounces, more or less, of morphine, said morphine not being sold, dispensed and distributed in or from an original stamped package.

IN UNITED STATES DISTRICT COURT

ARRAIGNMENT AND PLEA

This indictment is presented by the Grand Jury at the present September Term of this court, A. D. 1931, when, to wit, October 21, 1931, the Honorable James A. Lowell, District Judge, sitting, the said defendant Angelo Quercia is set to the bar and has this indictment read to him, whereupon he says that thereof he is not guilty.

On the said twenty-first day of October, A. D. 1931, a jury is duly empanelled and sworn according to law to try the issue, videlicit George W. MacDonald, Foreman, and fellows, videlicit, Sidney S. Rankin, Arthur D. Simonds, Charles A. Howard, Elwin F. Shepherd, Raymond E. Granfield, John A. Bruce, Alfred I. McNally, Xavier F. Faucher, Harold L. Harlow, Lawrence D. Duncan, Jr., and Joseph L. Brighton.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR DIRECTED VERDICT—Filed and Denied October 21, 1931

Now comes the defendant in the above-entitled action and moves that the court will order a verdict of not guilty on each and every count of the indictment upon the ground [fol. 3] that upon all the evidence the defendant is entitled to a verdict of not guilty, which the presiding judge is requested hereby to rule.

By His Attorneys, Joseph V. Carroll, Essex S. Abbott.

IN UNITED STATES DISTRICT COURT

VERDICT, JUDGMENT, SENTENCE

Also on the said twenty-first day of October, A. D. 1931, this cause is committed to the jury, who, after hearing all matters and things concerning the same, return their verdict and on oath say that the defendant Angelo Quercia is guilty on each of the two counts of the indictment.

Thereupon, on the twenty-first day of October, A. D. 1931, it is considered by the court, the Honorable James A. Lowell, District Judge, sitting, that the said defendant Angelo Quercia be imprisoned in the United States penitentiary at Atlanta, Georgia, for a term of five years on each of the two counts of the indictment, said sentences to run consecutively, and that he stand committed until said sentences be performed.

On the tenth day of November, A. D. 1931, a bill of exceptions is filed by the defendant Angelo Quercia, within extended time, and is allowed by the court on the twenty-second day of December, A. D. 1931.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions of Angelo Quercia—Filed November 10, 1931; allowed December 22, 1931

This is an indictment in two counts charging the defendant with a violation of the Harrison Narcotic Act. Each count alleged the same offense, but the same being committed on different dates. The indictment charges that the defendant did wilfully, unlawfully and knowingly dispense and distribute to one John Hesse, of Boston, in the District of Massachusetts, a compound, manufacture, salt, derivative and preparation of opium, to wit, three ounces more or less of morphine, said morphine not being sold, dispensed and distributed in or from an original stamped package.

One HESSE, called by the Government, testified as follows:

By Mr. Stone:

Q. 1. What is your full name?
A. John Hesse.
Q. 2. Your occupation?
A. Narcotic agent.
[fol. 4] Q. 3. How long have you been in the service of the United States Government?
A. Going on twelve years.
Q. 4. In the same position?
A. Yes.

Q. 5. As a Federal narcotic officer?

A. Yes, sir.

Q. 6. Whether or not during the months of August and September, 1931, by direction of your superior officers you were engaged in an investigation of the drug traffic in Boston and vicinity?

A. I was.

Q. 7. As a result of that investigation, did you come in contact with one Joseph Brogna?

A. I did.

Q. 8. One of the defendants who pleaded guilty in this case?

A. Yes, sir.

Q. 9. You don't have to tell everything about Brogna, only in so far as it relates to this case. Did you purchase drugs from him?

A. Yes, sir.

Q. 10. How many purchases did you make?

A. I think I made five from Brogna.

Q. 11. Now, whether or not you paid him for it?

A. Richey Fineberg made some, and I made the others.

Q. 12. You made several purchases from Brogna?

A. Yes, sir.

Q. 13. Brogna did not know you were a Federal officer?

A. No, sir.

Q. 14. You introduced yourself as a member of the underworld; I assume that is correct?

A. Yes, sir.

Q. 15. As a dealer in drugs?

A. Yes, sir.

Q. 16. Now, did you meet Brogna again on the 9th of September?

A. I did.

Q. 17. Where did you meet Brogna?

A. In Somerville, Massachusetts, alongside of the Ford Plant.

Q. 18. You met him there by arrangement, did you?

A. By appointment; yes, sir.

Q. 19. You had a conversation with him?

A. Yes, sir.

Mr. Stone: You will object to the conversation?

Mr. Carroll: Yes.

Q. 20. You had a conversation with Brogna?

A. Yes, sir.

Q. 21. The defendant was not there?

A. No, sir.

[fol. 5] Q. 22. As a result of that conversation with Brogna on Friday—what time Friday, by the way?

A. About 7:30 p. m.

Q. 23. At the Ford Plant, Somerville. Give the result of that conversation, what took place.

A. Brogna left me. He drove in his truck to 30 Puritan Road, where he disappeared from my sight, and Fineberg and myself followed that truck across the boulevard, up the hill and back to where we were to meet Brogna.

Q. 24. You followed him where?

A. To 30 Puritan Road.

Q. 25. What city?

A. Somerville. We got back to the place where we were to meet Brogna, and a very few minutes later Brogna came back to me with the defendant Quercia.

Q. 26. State the conversation. Come back to you where?

A. Alongside the Ford Plant in Somerville.

Q. 27. Brogna and Quercia?

A. Yes, sir.

Q. 28. You are there, Fineberg is there——

A. Quercia is there and Brogna.

Q. 29. Did you have any conversation?

A. I did.

Q. 30. State the conversation.

A. As they came up to the car I was sitting in, Brogna said to me, "Mack, shake hands with Tony. He is the main connection."

Q. 31. What does that mean?

A. He is the principal dealer, he is the top man.

The Court: What is that?

The Witness: He is the principal dealer in drugs, he is the head. "Shake hands with Tony. He is the main connection."

Q. 32. Who is Tony?

A. This man [indicating the defendant]. We shook hands, and I said to Quercia, "Tony," I said "the price is too high."

Q. 33. How much was the price quoted you?

A. Eighty dollars an ounce. "The price is too high. Nobody can make any money at that. It is too high." He said to me, "The price is not too high. I have a doctor up in Maine who sends $110 for five ounces at a time. I know it is not too high." I said, "It is. Forty or fifty dollars is the price." He said, "The best I can do is $75 an ounce. Take it or leave it."

Q. 34. Who said that?

A. This defendant. I said, "I have to have it. I will [fol. 6] take three pieces", meaning three ounces, at $75 an ounce, so Quercia directed me to give Joe Brogna $225.

Q. 35. What did he say to you?

A. He said, "Give the money to Joe. Joe will bring you back your stuff. I don't want to have anything to do with you in this business. You do all your business with Joe. He will be back with the stuff."

Q. 36. The other defendant who pleaded guilty?

A. That is the defendant who pleaded guilty. So I gave Joe the money.

Q. 37. How much money did you give Joe?

A. $225 on leaving and $5 when he returned. They left, and Joe came back about 8:15 and handed me a package with three envelopes, each envelope supposed to have an ounce.

Q. 38. How many ounces?

A. Two ounces and some grains.

Q. 39. About three ounces?

A. About three ounces.

Q. 40. You paid for three ounces?

A. Yes, sir.

Q. 41. Seventy-five dollars an ounce?

A. Yes, sir.

Q. 42. Will you select the approximate three ounces sold on September 9th [handing witness a package]?

A. This [indicating] is the package. It was delivered in this bag.

Q. 43. Is this the original bag in which the stuff was delivered?

A. Yes, sir.

Q. 44. Did you see any stamps on the packages? Is it in the same condition as it was when you received it from Joe?

A. Yes, except a sample was taken out of that bag by the United States chemist.

Mr. Stone: This is offered in evidence for identification, subject to the testimony of the chemist, who will be on later, as to the character of it.

[Bag containing three packages of alleged morphine marked "Exhibit 1 for Identification".]

Q. 45. Is the defendant, with whom you had the conversation on September 9th at the Ford factory in Somerville and who was introduced to you as the boss and who made the bargain with you as to the price, is he in the court room now?

A. Yes, sir.

Q. 46. Where is he?

A. Right alongside Mr. Carroll.

Mr. Stone (to the defendant): Will you stand up?

[fol. 7] Q. 47. Is that the man?

A. That is the same man; yes, sir.

Q. 48. Now, did you make any other purchase subsequent to the 9th of September?

A. I did. On the 13th of September, I bought two ounces of morphine from Joe Brogna.

Q. 49. You met him where?

A. 29 Spring Street, Chelsea, Mass.

Q. 50. Was that pursuant to an arrangement you made with this defendant?

A. With this defendant.

Q. 51. Was the price the same?

A. No, sir; the price went up $5—$80.

Q. 52. What excuse was there for $5 more?

A. I don't know.

Q. 53. Whether or not other officers followed Joe on the 13th after the meeting with you?

A. Agent Bradshaw, Mr. Artis and Mr. Sheehan.

Q. 54. They followed him, and they will testify——

A. —what took place.

Q. 55. After you saw him, he came back?

A. I met Joe at his home. He stood there waiting to finish washing an automobile and dressing. He put his family in the truck and drove to 22 Dorrance Street, Boston, near the Elevated, where he directed me to wait. I had an order for seven ounces, he wanted money for seven. I told him——

Mr. Carroll: Just a minute.

Q. 56. You had a conversation with Joe?

A. I had.

Q. 57. As a result of that conversation, Joe disappeared?

A. Joe disappeared, and Joe came back and delivered to me two ounces of morphine.

Q. 58. Have you the two ounces there?

A. I have them here some place [handing package to Mr. Stone].

Q. 59. Whether or not they were delivered to you in this identical condition, outside of——

A. Outside of the fact I opened them and took a sample out.

Q. 60. There were no stamps?

A. No stamps.

Mr. Stone: I offer these in evidence, subject to testimony of the chemist:

[fol. 8] [Bag containing two packages of alleged morphine marked "Exhibit 2 for Identification".]

Q. 61. That cost $160?

A. $160.

Q. 62. What is the other stuff?

A. That is drugs, evidence in the Brogna case.

Q. 63. Before you met the defendant?

A. Before I met this defendant; yes, sir.

Q. 64. Now, subsequent to these purchases and delivery of the stuff you obtained a warrant?

A. No warrants of arrest. We obtained search warrants.

Q. 65. What did you do subsequent to this last delivery and sale? When did you meet Quercia again, this defendant?

A. At 30 Puritan Road, about four o'clock on the afternoon of September 13th.

Q. 66. What kind of day was it, a hot day or a cold day?

A. A beautiful fall day—hot.

Q. 67. You met him on the 13th?

A. Yes, sir.

Q. 68. Where did you meet him?

A. 30 Puritan Road.

Q. 69. Did you arrest him?

A. I did.

Q. 70. Subsequent to the arrest, was the place searched?

A. Yes, sir.

Q. 71. What was found?

A. There was found a scale for weighing morphine; there was found about half an ounce of morphine, 100 and some grains, an old pistol that did not amount to anything.

Q. 72. What did you find?

A. An old pistol, I said, a gun.

Q. 73. An old gun?

A. Yes, sir.

Q. 74. Another man was there?

A. A man named Patterson there took the full responsibility for the drugs scale, drug and gun.

Q. 75. You turned that over to the police?

A. The police department of Somerville handled that case.

Q. 76. That would be a State offence?

A. Yes, sir.

Q. 77. When you brought him to the station, did you search the defendants after they were booked?

A. No.

Q. 78. Or at any time?

A. No, I didn't make a search. While we were at the station, at the Somerville police station, making an examination of money taken from Joe and checking with my [fol. 9] memorandum slips, the defendant spoke up, 'I have some money here.' We were going to search him. 'Do you want to look at that?'

Q. 79. You were going to search him anyway?

A. He handed us forty-five or fifty dollars. We compared it with our memorandum and we found among his money one of the five dollar bills I had paid Joe Brogna on September 9th.

Q. 80. For what?

A. Morphine.

Q. 81. You identify it by what?

A. By the serial number.

Q. 82. You have it here?

A. Yes, sir; this is the five dollar bill.

Q. 83. What is this?

A. That was taken from Joe. Here is the five dollar bill taken from money in his possession and here are the serial

numbers of those five dollar bills which I gave Joe Brogna on the night of September 9th in payment of three ounces of morphine.

Q. 84. This sale was made prior——

A. Prior to September 9th, when I made that bargain.

Mr. Stone: I offer this in evidence, the five dollar bill, Government Exhibit 3.

[Five dollar bill taken from money in possession of the defendant marked "Exhibit 3".]

Q. 85. What else did you observe?

A. I called the defendant's attention to the serial number on that bill and the memorandum slip at the time I took the bill from his money.

Q. 86. What did he say?

A. Not a word. He didn't answer,

Q. 87. Anything else?

A. That is about all."

Mr. Stone: Your witness.

Cross-examination.

By Mr. Carroll:

X Q. 88. How long had you known Brogna before you first met this defendant?

A. About a month.

X Q. 89. During that time you had purchased drugs from Brogna?

A. Yes, sir.

X Q. 90. And it was not until the 9th of September that you first met this defendant?

A. That is true.

X Q. 91. And you met him as a result of the talk you had [fol. 10] with Brogna, during which you had some discussion as to the price of narcotics?

A. Yes, sir.

X Q. 92. Brogna left you on that occasion and came back with this defendant?

A. Yes, sir.

X Q. 93. And the substance of your talk on that occasion was the price that Brogna was demanding for the narcotics?

A. Yes, sir.

X Q. 94. And after that talk you say you paid some money to Brogna for some narcotics?

A. I did.

X Q. 95. You paid in the presence of your own men—how much money did you pay?

A. $225.

X Q. 96. $225?

A. Yes, sir.

X Q. 97. And this defendant left with Brogna after that talk?

A. Yes, sir.

X Q. 98. Later Brogna returned, himself, with the narcotics?

A. Yes, sir.

X Q. 99. And this man was not present with him?

A. No.

X Q. 100. So that at no time did this man ever deliver to you any narcotic drugs?

A. He never did.

X Q. 101. He never sold any to you?

A. This man made the price.

X Q. 102. Did he ever sell it to you by delivering it personally to you?

A. No, sir.

X Q. 103. When did you next see him?

A. On the afternoon of September 13th.

X Q. 104. Where?

A. 30 Puritan Road.

X Q. 105. Who was present at that time?

A. Sergeant Connolly, narcotic agent Sheehan, narcotic agent Artis and Richey Fineberg.

X Q. 106. At that time you had no talk with this defendant?

A. Other than to tell him he was under arrest.

X Q. 107. Prior to that time you had met Brogna and had made another purchase of narcotic drugs?

A. Yes, sir.

X Q. 108. This defendant was not with him?

A. No, sir.

X Q. 109. You had not seen him until you went to 30 Puritan Road, accompanied by the other police officers?

A. That is right.

[fol. 11] X Q. 110. At that time you told him he was under arrest?

A. Yes, sir.

X Q. 111. You brought him to the Somerville police station?

A. Yes, sir.

X Q. 112. So that the drugs you received on the day of the 13th from Brogna, this defendant was not present and had no conversation with you relative to them?

A. No, sir, he was not present.

X Q. 113. You say when you went to the Somerville police station you searched Brogna and took some money from the defendant?

A. Donovan searched him. I found three five dollar bills, two I had spent on the 13th and one I spent on the 9th. At the same time I found that five dollars.

X Q. 114. Mr. Hesse, this receipt, or this paper here, contains the serial numbers of a great many bills, doesn't it?

A. Yes, sir—probably three or four hundred dollars there.

X Q. 115. There is nothing on that paper that distinguishes the money that you paid to Brogna on any one particular occasion?

A. No. That is the 9th. I think you will find it dated so there, the 9th.

X Q. 116. You purchased three ounces on September 9th. How much money did you pay him that day?

A. $230; $225 when he left with the defendant Quercia, and $5 he demanded on his return with the drugs.

X Q. 117. That [indicating the witness' memorandum] totals $365, does it not?

A. Yes.

X Q. 118. There is nothing on that paper that distinguishes this particular money that you gave to Brogna on September 9th?

A. No; I gave him $225 and $5.

X Q. 119. But that money on that paper is over $300?

A. Yes, sir; that is the total of the money I had in my possession at that time.

X Q. 120. It is not the money you gave Brogna at that time?

A. Of this there was $230 given to Brogna, of this $300.

X Q. 121. What is there on that paper that indicates the money you paid to Brogna?

A. Nothing on the paper. That is carelessness on my part.

[fol. 12] X Q. 122. So that the substance of your testimony, Mr. Hesse, is that the only contact you had with this defendant in the presence of Brogna was on the night of September 9th, at which time you discussed price, and this defendant at no time delivered personally *so* sold to you any narcotic drug?

A. That is right.

Mr. Carroll: That is all.

Redirect examination.

By Mr. Stone:

Q. 123. This list contains the serial number of the money you gave to Brogna?

A. The $225 is contained therein.

Q. 124. There is a serial number on this bill?

A. Yes, sir.

Q. 125. That serial number is right here?

Mr. Carroll: I will admit that is on the list.

Q. 126. You found that identical serial number in the possession of this defendant?

A. Yes, sir.

Recross-examination.

By Mr. Carroll:

X Q. 127. There is nothing on that paper that shows that five dollars was given to him on the night of the 9th of September?

A. No, sir.

Mr. Stone: He says that is part of the money he gave Brogna that night.

Redirect examination.

By Mr. Stone:

Q. 128. It is part of the money you gave Brogna?
A. Yes, sir.
Q. 129. It might be that night?
A. That night.

The Court: I understand that list to be a list of money you had in your pocket on September 9th?

The Witness: A list of the total moneys I had in my possession.

The Court: With the serial numbers?

The Witness: Yes, sir, and I did not when I left Brogna and Quercia take my money out again and go back over it and strike out the bills I had given Brogna.

The Court: On September 13th, did you have a different list?

The Witness: Yes, sir. I have that list here.

The Court: All right. That is all.

Mr. Stone: Thank you very much, Mr. Hesse.

[fol. 13] The next witness called by the United States was Richey Fineberg, who testified that he was an informer employed by the United States, that he was a user of drugs and he was present with Hesse at the time Hesse had the conversation on the night of September 9 with Brogna.

On cross-examination he admitted that Quercia at no time delivered any drugs to Hesse or was present when Brogna delivered any.

The next witness, Robert W. Artis, testified that he was a Federal narcotic agent; that on the afternoon of September 13 he followed the defendant Brogna and covered him from the time he left Hesse at Boston up to the time he entered the house at 30 Puritan Road, Somerville; that he saw the defendant Quercia come out with Brogna and Brogna's family and get into the truck that Brogna was driving; that he followed the truck but lost it about one-

quarter of a mile after it had left 30 Puritan Road; that it took him about 20 minutes to get back to the place where Hesse was going to meet Brogna and that when he returned Brogna was alone; that from the time he lost the defendant until he found Brogna and Hesse he does not know what stops were made; that he returned to the house and assisted in the arrest of the defendant, who was sitting in the house in his pajamas.

The next witness called by the United States was JOHN A. SHEEHAN, who testified that he was a Federal narcotic agent and that he assisted in the search of the house at 30 Puritan Road; that at the time of the search he found certain narcotic drugs in a room occupied by another roomer and this roomer admitted the drugs belonged to him and he had been prosecuted for their possession in the Somerville court; that a search of the room occupied by Quercia did not reveal any drugs.

The Government introduced the witness ARTHUR L. MORESKI, who testified that he was a Government chemist; that he had examined the sample and that it was morphine hydrochloride.

The defendant testified on his own behalf and made a general denial of all the charges.

[fol. 14] The foregoing is all the material evidence.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

At the close of the evidence the defendant made a motion for a directed verdict, which was denied and exception duly noted.

Defendant's Requests for Rulings

The defendant presented certain requests for rulings as follows, which requests were denied and exception duly taken:

1. That upon all the evidence the Government has not sustained the burden of proof and the court should direct the jury to bring in a verdict of not guilty upon all the counts of the indictment.

2. The Government offering no proof that the defendant was a dealer in narcotic drugs or that he was a person of a class of persons required to register and pay a special tax, the jury must find the defendant not guilty of the offenses alleged in all the counts of the indictment.

3. The Government having charged the defendant with selling from an unstamped package and having failed to prove that it was from an unstamped package, the jury must find the defendant not guilty on all the counts of the indictment.

4. Upon all the evidence the Government has not proved that the defendant sold, dispersed or distributed the morphine alleged in said indictment.

5. To find the defendant guilty on this indictment the Government must prove that the defendant

(a) Sold the narcotics;
(b) Dispensed the narcotics;
(c) Distributed the narcotics;

and having failed so to prove the defendant must be found not guilty.

6. The evidence of the witness Hesse that all Quercia did was to discuss the price of the drug does not warrant the jury in finding that he sold, dispersed or distributed the drug.

7. The counts specifically charge the defendant with having sold five ounces of morphine not from an original stamped package. The provision of the amended section regarding the penalties for failing to register and pay the

[fol. 15] tax applies only to those who sell from a stamped package. There being no evidence tending to prove that the morphine alleged to have been sold as charged in counts one and two was in or from an unstamped package, the defendant must be found not guilty.

At the close of the evidence the court gave the following charge to the jury:

Charge to Jury

Mr. Foreman and Gentlemen of the Jury: I will say a few words to you first about your functions and mine. I give you the law, and what I say is the law is binding on you; and if I state it wrong the Court of Appeals will correct me. I tell you what the law is, and that you must abide by. I also in this court, in the United States court, have the right to give you my opinion of the evidence, to say whether I think a certain witness is truthful or not, to tell you my opinion on the whole evidence; but that is not binding on you. As to the facts, you must disregard any opinion I may give you of the evidence; and it is your duty to go against my opinion if you don't agree with it.

Now, as in all criminal cases, the defendant at the bar is presumed innocent until you are persuaded beyond a reasonable doubt by the evidence offered by the Government that he is guilty. A reasonable doubt merely means a doubt for which you can give a reason. It is the kind of doubt which you would act upon if you were going about your own affairs. There is no magic, no hidden meaning to "reasonable doubt". It is merely a doubt founded not on a whim or a hunch, as we call it, but on some fact, for which you can give a reason.

There is another thing which I should tell you. That is, the fact that this defendant was indicted—you heard the indictment read—the fact that he was indicted is no evidence against him. An indictment is merely a statement of the grand jury of twenty-three men that there is something which ought to be brought before you jurors, you petty jury, as we call you, of twelve men. The indictment is no evidence against him, and he is presumed to be inno-

[fol. 16] cent until you are persuaded beyond a reasonable doubt that he is guilty. And I rule as a matter of law, Mr. Foreman and gentlemen, if you believe the evidence for the Government you may find him guilty under this indictment. That ruling will be excepted to by the defendant, as I understand, and the question of law thereby arising will be tested out in the upper court; but I rule, if you believe the evidence of Mr. Hesse and the others, you may find this defendant guilty on both counts. It is a question of whom you will believe.

And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.

Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.

I don't think I care to say anything else, Mr. Foreman and gentlemen.

I will save your exception, Mr. Carroll.

At the close of the charge the court saved the defendant's exception to the whole charge and particularly to the part wherein the court said:

"And I rule, as a matter of law, Mr. Foreman and gentlemen, if you believe the evidence for the Government, you may find him guilty under this indictment."

And later when he said:

"And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so, we don't know, but that is the fact. I think that every single word [fol. 17] that man said, except when he agreed with the Government's testimony, was a lie."

VERDICT

The jury returned a verdict of guilty on each count of the indictment.

The defendant, being aggrieved by the denial of his motion for a directed verdict and the refusal to give his requests in form or in substance and the charge of the presiding judge, all as aforesaid, brings this bill of exceptions and prays that it may be allowed.

By His Attorneys, Joseph V. Carroll, Essex S. Abbott.

Assented to.

Frederick H. Tarr, United States Attorney, by Elihu D. Stone, Assistant United States Attorney.

December 22, 1931. Exceptions allowed.

James A. Lowell, United States District Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL OF ANGELO QUERCIA—Filed November 10, 1931; allowed December 22, 1931

Now comes the defendant Angelo Quercia, in the above-entitled cause, and being aggrieved by the error committed in said proceedings and by the judgment of the court rendered against him, prays that an appeal to review the same may issue to the United States Circuit Court of Appeals for the First Circuit, and said appeal may supersede the execution of the judgment of this court against him, pending a review of said judgment and proceedings by said Circuit Court of Appeals.

By His Attorneys, Joseph V. Carroll, Essex S. Abbott.

December 22, 1931. Appeal allowed except as to bail.

James A. Lowell, United States District Judge.

[fol. 18] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed November 10, 1931

1. The court erred in denying the defendant's motion for a directed verdict of not guilty, as more particularly appears in his bill of exceptions.

2. The court erred in his charge to the jury in ruling, as a matter of law, that if the jury believed the evidence for the Government they could find the defendant guilty under the indictment.

3. The court erred in charging the jury as follows:

"Now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie."

4. The court erred in denying the following requests for rulings:

1. That upon all the evidence the Government has not sustained the burden of proof and the court should direct the jury to bring in a verdict of not guilty upon all the counts of the indictment.

2. The Government offering no proof that the defendant was a dealer in narcotic drugs or that he was a person of a class of persons required to register and pay a special tax, the jury must find the defendant not guilty of the offenses alleged in all the counts of the indictment.

3. The Government having charged the defendant with selling from an unstamped package and having failed to prove that it was from an unstamped package, the jury must find the defendant not guilty on all the counts of the indictment.

4. Upon all the evidence the Government has not proved that the defendant sold, dispersed or distributed the morphine alleged in said indictment.

[fol. 19] 5. To find the defendant guilty on this indictment the Government must prove that the defendant

(a) Sold the narcotics;
(b) Dispensed the narcotics;
(c) Distributed the narcotics;

and having failed so to prove, the defendant must be found not guilty.

6. The evidence of the witness Hesse that all Quercia did was to discuss the price of the drug does not warrant the jury in finding that he sold, dispersed or distributed the drug.

7. The counts specifically charge the defendant with having sold five ounces of morphine not from an original stamped package. The provision of the amended section regarding the penalties for failing to register and pay the tax applies only to those who sell from a stamped package. There being no evidence tending to prove that the morphine alleged to have been sold as charged in counts one and two was in or from an unstamped package, the defendant must be found not guilty.

By His Attorneys, Joseph S. Carroll, Essex S. Abbott.

Citation, in usual form showing service on Frederick H. Tarr, omitted in printing.

[fol. 20] Clerk's certificate to foregoing transcript omitted in printing.

MEMORANDUM RE ORDERS ENLARGING TIME

MEMORANDUM.—Orders of enlargement of time for docketing case to, and including, April 20, 1932, are here omitted.—A. I. Charron, Clerk.

[fol. 21] In United States Circuit Court of Appeals for the First Circuit, October Term, 1932

No. 2688

Angelo Quercia, Defendant, Appellant,

v.

United States of America, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson, and Morton, JJ.

Opinion of the Court—January 3, 1933

Wilson, J.:

The appellant and one John Brogna were indicted under two counts and charged with selling, dispensing and distributing a narcotic drug on two separate days. Brogna pleaded guilty. The appellant was found guilty by a jury. The main issue was whether the evidence warranted a finding by the jury that the appellant participated as a principal in the sale of the drug, the officer who purchased the drug testifying that he paid Brogna for it and it was delivered to him by Brogna.

The officer, however, further testified that he had a conversation with the appellant and Brogna together as to the price to be paid, and the appellant was referred to by Brogna as the "main connection"; that the price was fixed by the appellant and the officer was told that Brogna would [fol. 22] deliver it and the money could be paid to Brogna; that the appellant did not want to have anything to do with the business.

After his arrest a five dollar bill paid to Brogna was found in his possession, identified by its serial number.

At the close of the evidence counsel for the appellant requested the court to instruct the jury that:

"4. Upon all the evidence the Government has not proved that the defendant sold, dispensed or distributed the morphine alleged in said indictment.

"5. To find the defendant guilty on this indictment the Government must prove that the defendant

(a) Sold the narcotics;
(b) Dispensed the narcotics;
(c) Distributed the narcotics;

and having failed so to prove the defendant must be found not guilty.

"6. The evidence of the witness Hesse that all Quercia did was to discuss the price of the drug does not warrant the jury in finding that he sold, dispensed or distributed the drug."

The court refused to give these instructions, but instructed the jury as a matter of law that if they believed the evidence for the government, they might find the appellant guilty.

As to the principal issue raised at the trial and by the requested instructions, viz: that there was not sufficient evidence to show that the appellant participated as a principal in the sale and distribution of the drug, we think the instruction of the presiding judge was a correct statement of the law. The instruction excepted to was evidently given instead of the instructions requested by the appellant.

It is true that whether the evidence of the government, even if believed, removes all reasonable doubts from the minds of the jury is a question of fact and not of law; and the instruction, if a direction to find the appellant guilty if the jury believed the testimony of the government, would have been prejudicial error; Grillo v. United States, 26 Fed. (2d) 461; but we think the jury could not have misapplied this instruction in view of other portions of the [fol. 23] charge, and the defense of the appellant as disclosed by the evidence.

The other part of the charge excepted to might well have been omitted. The presiding justice then went on to say:

"And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost

always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.

"Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty."

It is difficult to conceive of a jury accepting seriously such a standard for determining whether a witness was telling the truth.

The bald accusation by a presiding judge that a respondent in a criminal case is a liar is seldom justified, and, if ever, only under unusual circumstances. However, as this court has said in a previous case, Malaga v. United States, 57 Fed. (2d) 822, no hard and fast rule can be laid down for determining whether a presiding judge has exceeded his prerogative in instructing the jury upon the facts, and each case must stand on its own bottom.

In this case the testimony of the appellant to which the court referred is not printed in the record. So far as appears from the record, the appellant may have clearly deserved the characterization, and the appellant could not have been prejudiced thereby. The jury was expressly told that it was only the opinion of the presiding judge, and that if they did not agree, it was their duty to find him not guilty, which on the other hand may have been more favorable to the appellant than the evidence warranted.

The judgment of the District Court is affirmed.

[fol. 24] In United States Circuit Court of Appeals

Dissenting Opinion

Bingham, J. (dissenting):

The instruction of the presiding judge to the jury—"And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he *wiped his hands* during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, *but that is the fact.* I think that every single word that man

said, except when he agreed with the Government's testimony, was a lie''—cannot, by any stretch of the imagination, be regarded as a fair, dispassionate statement by a judge to a jury in a criminal case. Although a presiding judge in the federal court may express his opinion on the facts, if he informs the jury that they are not bound by his opinion if they do not agree with him, nevertheless there is a limit beyond which he cannot go, and I am bound to say that the above instruction was so charged with passion and prejudice that it exceeded the bounds of fair comment, and caused a mistrial.

Furthermore, the instruction, couched as it was, was not only highly prejudicial, so far as it was an expression of opinion, but it contained a statement of fact by the presiding judge of which there was no evidence. He said: "You may have noticed, Mr. Foreman and gentlemen, that he (the accused) wiped his hands during his testimony * * * that is almost always an *indication of lying.* Why it should be so, we don't know, *but that is the fact.*" In other words, he said: If a witness wipes his hands during his testimony, it is a fact indicative of lying. There was no evidence in the case to this effect. In making this statement the presiding judge was testifying, and his testimony was of that subtle character that was highly prejudicial. It is not the province of a federal judge to testify in his charge—that is not comment on the evidence—and when he does so and his testimony is prejudicial, it will render the trial unfair. That is what happened in this case.

[fols. 25 & 26] On October 13, 1932, this case came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the third day of January, A. D. 1933, the opinion of the court (page 21) and a dissenting opinion (page 24) were filed and the following Judgment was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—January 3, 1933

This cause came on to be heard October 13, 1932, upon the transcript of record of the District Court of the United

States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, January 3, 1933, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court.

Arthur I. Charron, Clerk.

MEMORANDUM RE STAY OF MANDATE

Thereafter, to wit, on January 19, 1933, mandate was stayed until further order of court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 27] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 27, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,398. U. S. Circuit Court of Appeals, First Circuit. Term No. 701. Angelo Quercia, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed February 15, 1933. File No. 37,398.

FILE COPY

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CHARLES ELMO

Supreme Court of the United States.

October Term, 1932.

No. 701

Angelo Quercia,
Petitioner,

v.

United States of America,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit, and Brief in Support Thereof.

ESSEX S. ABBOTT,
Attorney for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1932.

No.

ANGELO QUERCIA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

Respectfully represents Angelo Quercia of Boston in the Commonwealth of Massachusetts, and prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above-entitled case on the third day of January, 1933, affirming the conviction in the United States District Court of said petitioner.

QUESTIONS PRESENTED.

It is requested that this Court review and revise rulings of law decided by the Circuit Court of Appeals, as we think, erroneously.

1. That a presiding judge in a criminal case has exceeded his prerogative in instructing a jury upon the facts when he makes the following statement during his charge:

> "You may have noticed Mr. Foreman and Gentlemen that he wiped his hands during his testimony. It is

rather a curious thing but that is almost always an indication of lying. Why it should be so we do not know, but that is the fact. I think that every single word that man said except when he agreed with the Government's testimony was a lie."

2. That the presiding judge refused to charge the jury as to the essential elements of the offense charged in the indictment by refusing to give, in form or in substance, instructions seasonably requested by the defendant, or to make any allusion in his charge to the essential elements of the offense charged, which were issues in the case.

Statement.

The petitioner was indicted with one Joseph Brogna at the September Term of the United States District Court, to wit, October 21, 1931, for violating the Harrison Narcotic Law (Act of Congress December 17, 1914, as amended). Brogna pleaded guilty and was sentenced to three years' imprisonment. The petitioner stood trial.

The indictment contained two counts, the first count alleging—

> "That Joseph Brogna, of Chelsea in the District of Massachusetts and Angelo Quercia of Somerville, in the District of Massachusetts, on or about the 9th day of September in the year 1931, at Somerville, in the District of Massachusetts, did wilfully, knowingly and unlawfully sell, dispense and distribute to one John Hesse of Boston in the District of Massachusetts, a compound, manufacture, salt, derivative and preparation of opium, to wit, three ounces, more or less of morphine, said morphine not being sold, dispensed in or from an original package."

The second count is the same, only the sale is alleged as of September 13, 1931, and the quantity is two ounces.

Upon his conviction the defendant was sentenced to a term of five years on each count, said sentences to run consecutively.

One Hesse, a government narcotic agent, testified in substance that for a month or two prior to the arrest of Brogna and Quercia he had been purchasing drugs from Brogna. About a month and a half after the first purchase from Brogna, Hesse met Brogna by appointment. A dispute as to price arose and Brogna left. Later on Brogna returned, accompanied by Quercia. A talk was had, during which talk the price of drugs was discussed, and Quercia joined in the conversation. Brogna and Quercia left, and Brogna returned alone and delivered drugs to Hesse. The transaction was the only one in which Quercia appeared, and no drugs were actually delivered to Hesse in Quercia's presence.

Quercia testified in his own behalf, and at the close of the evidence and arguments the District Judge charged the jury as follows:

"Mr. Foreman and Gentlemen of the Jury:

"I will say a few words to you first about your functions and mine. I give you the law, and what I say is the law is binding on you; and if I state it wrong the Court of Appeals will correct me. I tell you what the law is, and that you must abide by. I also in this court, in the United States Court, have the right to give you my opinion on the evidence, to say whether I think a certain witness is truthful or not, to tell you my opinion on the whole evidence; but that is not binding on you. As to the facts, you must disregard any opinion I may give you of the evidence; and it is your duty to go against my opinion if you don't agree with it.

"Now, as in all criminal cases, the defendant at the bar is presumed innocent until you are persuaded beyond a reasonable doubt by the evidence offered by the Government that he is guilty. A reasonable doubt merely means a doubt for which you can give a reason.

It is the kind of a doubt which you would act upon if you were going about your own affairs. There is no magic, no hidden meaning to 'Reasonable doubt'. It is merely a doubt founded not on a whim or a hunch, as we call it, but on some fact, for which you can give a reason.

"There is another thing which I should tell you. That is, the fact that this defendant was indicted—you heard the indictment read—the fact that he was indicted is no evidence against him. An indictment is merely a statement of the grand jury of twenty-three men that there is something which ought to be brought before you jurors, you petty jury, as we call you, of twelve men. The indictment is no evidence against him, and he is presumed to be innocent until you are persuaded beyond a reasonable doubt that he is guilty. And I rule as a matter of law, Mr. Foreman and gentlemen, if you believe the evidence for the Government you may find him guilty under this indictment. That ruling will be excepted to by the defendant, as I understand, and the question of law thereby arising will be tested out in the upper court; but I rule, if you believe the evidence of Mr. Hesse and the others, you may find this defendant guilty on both counts. It is a question of whom you will believe.

"And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.

"Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.

"I don't think I care to say anything else, Mr. Foreman and gentlemen.

"I will save your exception, Mr. Carroll."

The petitioner sought to reverse the conviction on the ground that he was not guilty of the sales set out in the indictment, that his motion for a directed verdict of "not guilty" was denied, that his requests for instructions were refused, and further that the District Judge exceeded his prerogative in commenting on and characterizing the defendant's testimony as "a lie," and also in substance and effect testifying himself as to a matter which nowhere appears in the testimony, and as to which there was no testimony, and which was not in issue, namely, that it was a *fact* that a person who wiped his hands during his testimony was lying.

The Circuit Court of Appeals, in a two-to-one opinion, the Senior Judge writing a dissenting opinion, affirmed the conviction.

Specifications of Error.

1. The Circuit Court of Appeals erred in its ruling that it was not error for a District Judge in the course of his charge to comment on the defendant's testimony, and to testify as to a fact as to which no evidence had been offered, and which had no relation to the charge on which the petitioner was being tried.

2. The Circuit Court of Appeals erred in its ruling that it was not error for the District Judge to refuse the instructions requested by the defendant, said instructions being pertinent to the issues, and to charge the jury with no reference to the provisions of law pertinent to the offenses charged.

Reasons for Granting the Writ.

1. That said decision is unsound in law and denied the defendant a fair and impartial trial.

2. That said decision is against the weight of authority.

3. That there is a limit beyond which the presiding judge cannot go, in his charge to the jury, and that the charge in the instant case goes so far beyond any of the decided cases that there should be an authoritative decision in the instant case.

4. That there have been three decisions of the Court of Appeals for the First Circuit reversing the same District Judge for the unfair comment in his charge, but recently the Circuit Court of Appeals, with a change of membership, has shown a tendency to overlook such comment on the part of the District Judge and to make light of it, as may be seen by the remarks of the Court in affirming the decision of the District Court in the instant case.

5. That unless some limit is placed upon comment by the Court in its charge to the jury, the trial of criminal cases in the First Judicial District will descend to such a level that it will be impossible for a defendant to secure a fair and impartial trial.

6. That the decision in the instant case has caused such wide comment in the First District that the bar in general feel that it is time for some decision of the Supreme Court upon the matter of prejudicial charges and conflicting decisions as in the First Circuit and elsewhere.

7. That the decision in the instant case affirms a judgment of conviction where the trial judge refused to give instructions to the jury upon the essential elements of the offenses charged.

For the foregoing reasons, and for those which hereinafter appear in the brief and argument, your petitioner respectfully prays that his petition be granted.

ESSEX S. ABBOTT,
Attorney for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1932.

No.

ANGELO QUERCIA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION.

The opinion of the Circuit Court of Appeals in affirming the conviction of the petitioner has not been printed.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on the 3d day of January, 1933. The jurisdiction of this Court is invoked under section 20A of the Judicial Code, as amended by the Act of February 13, 1925.

ARGUMENT.

This case presents a question of the greatest importance, affecting substantial rights of a defendant, namely, the right to a fair and impartial trial. The question is as to the right of a trial Court to comment on a defendant's testimony and express an opinion that the defendant's testimony was "a lie," and then to go further and to testify in substance and effect, as was done in the instant case, that, although "*why it should be so, we don't know, but that is the fact*" that a man who *wipes his hands is lying.* A de-

fendant is presumed under our law to be innocent until a jury finds him guilty. If this presumption exists, is it not prejudicial and a taking away of a substantial right for a judge to add his testimony as to what he says is a fact, upon which no evidence has been offered? A judge may comment on the evidence, but it cannot be held to be fair and impartial for a judge to say to a jury: "Every single word that man said, except when he agreed with the Government testimony, was a lie."

If it be held to be fair comment for a judge to say what was said in this case, what are the limits as to fair comment? What is to prevent a judge, who has a dislike for red neckties, saying to a jury: "You may have noticed, Mr. Foreman and Gentlemen, that the defendant wore a red necktie while testifying. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact." This is an extreme example, but one can readily see the danger that exists unless this Court takes the responsibilty of deciding if this is fair comment.

Until the decision in the instant case it has been generally understood by bench and bar that there is a limit beyond which a trial judge may not go in his charge to the jury. Now, however, the majority opinion says: "There is no hard and fast rule that can be laid down in determining whether or not a judge has exceeded his prerogative in instructing the jury on the facts."

The majority opinion of the Circuit Court of Appeals weakly attempts to justify its position by saying that, because the defendant's testimony was not printed in the record, he may very well have deserved the characterization. This is nothing more than an evasion of the issue. It appears to be nothing more than a subterfuge and a desire to the majority of the Court to gloss over an embarrassing situation, as may be seen from the statement of the majority opinion: "It is difficult to conceive of a jury accepting

seriously such a standard for determining whether a witness was telling the truth."

The weakness of that statement is apparent, not only from what appears in the charge to the jury set out in the record, but also from the influence of the great weight of the judge, to "whose lightest word the jury, properly enough, gives a great weight." *Hicks* v. *United States, infra.* It is clear from the reading of the judge's charge that he meant that the jury should accept him "seriously," and there is no reason to suppose that the jury did not take him "seriously" and render their verdict accordingly.

We must assume, and the Appellate Court should have assumed, that the jury was "accepting seriously" every word uttered by the judge in his charge, especially in the light of judicial decisions and express language as to "the great weight which attaches to intimations of opinion from the Judge," to quote the words of Judge Day, afterwards a Justice of the Supreme Court, in *Mullen* v. *United States, infra.*

It is certain that the statement of the trial judge was made with the deliberate intent to influence the jury because the brief charge dealt only with the generalities of reasonable doubt, the indictment being no evidence against the defendant, and the presumption of innocence. Then the charge, without stating the propositions of law connected with the particular offenses charged in the indictment, and ignoring the defendant's requests for instructions, goes on to deal with the question of the defendant's veracity, and we find these words: "If you believe the evidence for the government you may find him guilty under the indictment . . . It is a question of whom you will believe." And then, feeling that the jury might not believe the government's witness, but might believe the defendant, the judge goes on to give his own expert testimony as to wiping hands being "almost always an indication of lying," although adding in the next sentence: "*Why* it should be

so *we don't know but that is the fact.*" If this would not influence the jury, and prejudice the jury against the defendant, then, we submit, that there is nothing that a judge could say to influence the jury to the prejudice of a defendant who has testified in his own behalf.

And here we have a judge giving expert testimony of the meaning of a gesture or mannerism or idiosyncracy of a witness under the nervous strain of testifying when ten years of his liberty is at stake, that such is a fact indicating lying, although the judge does not know why it should be so, and so tells the jury, and apparently assumes that the jury does not know either. This passes anything in the decided cases.

And it is fundamentally and essentially wrong to have testimony of an alleged "fact" going into the case without an opportunity for cross-examination. Of course there is no such opportunity when the evidence is closed and the testimony of the alleged "fact" comes from the judge in his charge.

The majority opinion also states: "In this case the testimony of the defendant is not printed in the record." The record states at the conclusion of the summary of the testimony of the government witnesses and the defendant: "The foregoing is all the material evidence." The defendant's full testimony by question and answer was unnecessary under Rule 8 of the Supreme Court. The rule was followed as to all the witnesses except government witness Hesse, upon whose testimony the government case was founded, because this was the only witness whose testimony in any way tended to connect the defendant with the offenses charged in the indictment.

The record states (R. 313): "The defendant testified upon his own behalf and made a general denial of all the charges." This is certainly an adequate summary of the substance of the testimony of the defendant under the rule. It would not have added to the force of the record to set forth his testimony in more detail, to say nothing of setting

it forth by question and answer. The characterization objected to is chiefly objectionable because of the premise upon which the trial judge based it, namely, that he wiped his hands while testifying, and therefore was a liar. It was not because of anything the defendant *said* while testifying, so consequently could not have appeared in the record.

The following authorities throw considerable light on how far a trial judge may go in his charge in commenting on evidence.

In England the law is:

> "1. After the close of the reply of the Counsel for the Prosecution the presiding Judge sums up the whole case and the evidence to the jury, gives his direction on the matters in issue and on the points of law applicable to these matters, and may give his opinion on such matters."
>
> Halisbury's Laws of England, vol. 9, at p. 369.

Attention is called to the case of *Rex* v. *Mason* (1932), 18 Cohens' Appeal Reports. In this case the trial Court said: "I invite you to take such and such a course." The Court of Criminal Appeals said, in quashing the conviction: "The idea of inviting a jury is suited rather to an advocate than to a judge."

In *Rex* v. *O'Donnell* (1917), 12 Cohens' Criminal Appeal Reports, 219, the Criminal Court of Appeals refused to quash the verdict on the ground that the presiding judge had not exceeded his authority, holding that a judge in directing a jury is clearly entitled to express his opinions on the facts of the case, provided he leaves the issues of the fact to the jury to determine. A judge apparently is not justified in directing a jury or using in the course of his summing up such language as leads them to think that he is directing them, and that they must find the facts in the way which he indicates.

In the United States we have the following cases:

Hicks v. *United States*, 150 U.S. 442. The defendant had gone on the witness stand. The judge said that there was a conflict as to the material facts between his statements and the statements of the other witnesses who were telling the truth, and that the jury would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses, etc. In the majority opinion the Court said that the privilege of the defendant to testify in his own behalf "would be a vain one if the judge, to whose lightest word the jury, properly enough gives a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability."

In *Starr* v. *United States*, 153 U.S. 614, it was held "that there were limitations on the power of a Federal Court in commenting on the facts of a case, when instructing a jury, limitations inherent in and implied from the very nature of the judicial office."

In *United States* v. *Breitling*, 20 How. 252, the Court said: "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

In *Mullen* v. *United States*, 106 Fed. 895, Day, C.J., C.C.A. 6th Cir., said: "We do not understand the practise in the Federal Court, liberal as it is, to permit such comments outside of the testimony to go to the jury

with the great weight which attaches to intimations of opinion from the judge."

In *Weare* v. *United States*, 1 Fed. (2) 617, in reversing a conviction, the Circuit Court of Appeals said: "Other remarks were made by the court equally objectionable, which it is not necessary to set out. The whole tenor of the instructions was apparently to influence the jury to return a verdict of guilty. It was a palpable attempt to usurp the function of the jury as to fact questions and to impose the will and desire of the court upon it, and to interfere with the independent judgment of the jurors. Under the Constitution one accused of crime is entitled to a determination by a jury of the fact questions involved. The jury can easily be misled by the court. Its members are sensitive to the opinions of the court, and it is not a fair jury trial when the court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution. The government provides an officer to argue the case to the jury. That is not a part of the court's duty. He is not precluded, of course, from expressing his opinion of the facts, but he is precluded from giving a one-sided charge in the nature of an argument. We do not think the error in this case is cured by the mere statement to the jury that they were not bound by his opinion and that they should follow their own judgment."

In *Parker* v. *United States*, 2 Fed. (2) 710, the District Judge said: "Personally I would rather believe a girl who had been wronged than the man who would desert his wife and children to wrong her, but that is another impression that is personal to me, and which you are not to regard in any way, whatsoever, or for any purpose." The Circuit Court of Appeals said: "The mere statement that the jury was not obliged to follow the opinion of the Judge did not correct the error"; indeed that statement may well be put in such

a form as to imply disparagement of the jury's intelligence, if it does not agree with the judge; the present charge does not lack that atmosphere.

In *Graham* v. *United States*, 12 Fed. (2) 717, the Court said, in reversing the District Court: "It is however of first importance, both to the particular defendant who may be on trial and to the administration of justice generally, that everyone shall recognize that what is said from the bench is the cool and well balanced utterance of an impartial judge, and has in it naught of the heat and partisanship of the advocate."

In *Cook* v. *United States*, 14 Fed. (2) 833, a conviction was reversed where the judge said that "He gave no credence whatever to the statement of the defendant," and repeated it many times.

In *Barham* v. *United States*, 14 Fed. (2) 835, the same Court, reversing the conviction, says: "The language objected to is that in which the court stated that he drew certain inferences, and expressed the opinion that certain material facts were true, although as the Court said, 'there is no evidence of that'."

In *O'Shaughnessy* v. *United States*, 17 Fed. (2) 225, at 228: "General statements in the charge, to the effect that the jury were at liberty to disregard the Court's views as to guilt or innocence, and to base their verdict on their own conclusions from the evidence, did not cure the fault in the charge of a lack of impartiality in submitting the evidence to the jury, or, justify the court in making one-sided recitals of evidence, or in furnishing arguments in behalf of only one side of issues as to which the evidence was conflicting."

In *Smith* v. *United States*, 18 Fed. (2) 896, where the judge made a statement that he believed a witness told the truth and proceeded to give his reasons, it was held reversible error, as being not within the limits of legitimate judicial comment.

In *Sunderland* v. *United States,* 19 Fed. (2) 202, in reversing a conviction, the Court said: "A fair trial means that while the judge may and should direct and control the proceedings, and may exercise his right to comment on the evidence, yet he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror."

In the State Courts of Massachusetts exceptions have been sustained in civil cases where the attorney in argument for a party has made a statement of fact. The statement of an attorney, whose duty it is to be at least partial to his client and his client's cause, could have but little effect on the jury in comparison with utterances of the judge, whose function is to instruct the jury and to give the parties a fair and impartial trial. We cite only the latest case in the reports.

In *Doherty* v. *Levine,* 278 Mass. 418, 419, in the opinion by Rugg, C.J., it is said:

> "The statement in argument by the plaintiff's attorney was entirely improper and prejudicial in nature. It was a statement of fact purporting to be on his personal knowledge or at least concerning which the inference well might be drawn that he had personal knowledge. It was a matter concerning which testimony should have been introduced if it was to be considered by the jury." (Citations.)

In Massachusetts the following cases have arisen on the right of the District Judge to comment on the defendant in his charge.

> *Grillo* v. *United States,* 26 Fed. (2) 461. In this case the Court characterized the defendant's testimony. The Circuit Court of Appeals, then made up of Anderson, Bingham, and John, JJ., reversed the lower Court, and said:

"It appears in the bill of exceptions that the court, having instructed the jury as to the law of the case, said: 'So much for the law. Now, as to the facts. It would serve no useful purpose for me to rehearse them. The defendant took the stand, and the case turns on whether you think he was telling the truth.' We think this statement was misleading. It was made at the very close of the charge. It gave the jury to understand that, if they did not believe the defendant they could find him guilty. To so charge was a plain error of law. If the jury did not believe the defendant was telling the truth, that would not justify a verdict of guilty. They must go further and find that the defendant entered into a plan or conspiracy with other persons to bring liquor into the country without paying the customs duties and without a permit, and that some overt act was done in furtherance of the conspiracy; and they must be satisfied beyond a reasonable doubt of the proof of these facts. Although the court in the earlier part of its charge outlined what the government was required to prove to establish its case, we nevertheless think that in this parting sentence to the jury it fell far short of what it should have done, and, by so doing, may have misled the jury and excused it from performing its full duty, to the defendant's prejudice."

Later, in the case of *United States* v. *Cohen*, 56 Fed. (2) 28, at p. 30, we find the following:

" 'Now this is a very simple question, and it is entirely a question of whether this man Cohen was the man who ran away from that automobile on the 14th of August, 1929. It is entirely a question of fact. Do you believe him, gentlemen? I do not; but it is entirely for you to say. That is all I care to say, gentlemen.' But the issue in the case was not whether Cohen was the man who ran away from the automobile on the 14th of August. It was whether on that date he unlawfully

possessed and unlawfully transported intoxicating liquor."

In the case of *Malaga* v. *United States*, 57 Fed. (2) 822, at 828, we find the following statement by the Court in reversing the conviction because of the judge's charge:

"But a statement of facts not in evidence, an argumentative discourse, a repeated assertion that the respondent or other witness is not telling the truth, or a direct or indirect instruction that a respondent in a criminal case is guilty, may not be sufficiently neutralized by a reminder that it is for the jury to say.

"That the record before us gives a full and fair picture of what occurred in the trial below, we are reluctant to believe; but we cannot base our conclusions on conjecture, or on what probably occurred.

. . . . . .

"We think a trial judge should hesitate in expressing his opinion on the guilt of a respondent in a criminal case, though he may be permitted to give his opinion on the evidentiary facts. Argumentative discussion on the effect of evidence as proof, or the inference to be drawn from the acts of witnesses, or of the respondent in a criminal case, are universally recognized as out of place from the bench.

"One of the underlying principles of our jurisprudence is that the scales of justice in the trial of a cause must be held in even balance by the presiding judge. It is our pride that under our Constitution and laws a respondent in a criminal case, though guilty, is entitled to a fair and impartial trial."

All three cases were reversed, yet in the instant case, which is far stronger than any one of the three previous cases, we find the majority opinion scrapping the cases and affirming the conviction.

The three foregoing cases show the progressive stages, from the time when the Circuit Court of Appeals for the First Circuit held as in the Grillo case, *supra,* to the instant case, of the tendency of the District Judge presiding in the criminal session in the District of Massachusetts to ignore the principles of law involved in the offenses charged, and the necessary elements of the alleged offense to be proved to the satisfaction of the jury beyond a reasonable doubt to justify a conviction, and leave to the jury, as the principal issue to be decided by them, the question of whether or not the defendant was lying, instead of proof beyond a reasonable doubt of the essential elements of the alleged offense. The course so pursued has been insidious, steady, and progressive, as is clearly illustrated by the charges to the jury in the Grillo case, the Cohen case, the Malaga case, all hereinbefore cited, and the instant case.

The Defendant was Entitled to have the Jury Charged on the Essential Elements of the Defense.

The defendant contended before the Circuit Court of Appeals, and now contends, that he was entitled to have the judge charge the jury with reference to the essential elements of the offense, as to which he seasonably requested specific instructions set forth in the record, and not to have the jury decide the case, not upon proof beyond a reasonable doubt of the essential elements of the offense, but on the issue of his veracity. It may be that the jury did not find, and could not have found, that all of the essential elements of the offense charged had been proved beyond a reasonable doubt, and may have reached their verdict because they did not believe the defendant, or believed that the defendant was lying because the judge said he believed the defendant was lying, and that it was an indication of lying because the defendant wiped his hands in his testimony.

Such was the law in the First Circuit in the Grillo case, *supra,* and the part of the opinion in the Grillo case hereinbefore quoted seemed to the defendant to be an irresistible argument, and it would have been, had the Grillo case been followed instead of scrapped. The Cohen case, *supra,* is an added authority, and, at the time of the decision of the Cohen case, the Grillo case was apparently being accepted as the law in the First Circuit, from the reasoning of the opinion, although not therein cited. The reasoning is along the same lines.

Conclusion.

And in conclusion it is respectfully submitted that the charge of the presiding judge, ignoring the essential elements of the offense charged, refusing pertinent requests thereto, leaving the issue to depend upon the veracity of the defendant, characterizing the testimony of the defendant as "lying," and adding his own testimony of what he stated to be "the fact" that a man who wipes his hands during his testimony is lying, although we don't know why, went far beyond fair comment, denied the defendant the fair and impartial trial to which he was entitled. For these reasons, more fully hereinbefore stated, supported by authorities, the writ of certiorari should issue.

ESSEX S. ABBOTT,
Attorney for Petitioner.

FILE COPY

Supreme Court of the United States

October Term, 1917.

No. 701.

Angelo Guerrio,
Petitioner,

v.

United States of America.

PETITIONER'S BRIEF.

HERBERT S. ABBOTT,
Attorney for Petitioner.

(Abbott & Hamilton, of Utica, and Thomas Thomas, Counsel.)

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Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 701.

ANGELO QUERCIA, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITIONER'S BRIEF.

STATEMENT OF THE CASE.

This is a petition for certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit, affirming a conviction of the defendant (the petitioner here) in a criminal case.

The petitioner was indicted with one Joseph Brogna at the September Term of the United States District Court for the District of Massachusetts, to wit, October 21, 1931, for violating the Harrison Narcotic Law (Act of Congress December 17, 1914, as amended). Brogna pleaded guilty and was sentenced to three years' imprisonment. The petitioner stood trial before Lowell, J., and a jury.

The indictment contained two counts, the first count alleging—

> "That Joseph Brogna, of Chelsea in the District of Massachusetts and Angelo Quercia of Somerville, in the District of Massachusetts, on or about the 9th day of September in the year 1931, at Somerville, in the District of Massachusetts, did wilfully, knowingly and

unlawfully sell, dispense and distribute to one John Hesse of Boston in the District of Massachusetts, a compound, manufacture, salt, derivative and preparation of opium, to wit, three ounces, more or less of morphine, said morphine not being sold, dispensed in or from an original package."

The second count is the same, only the sale is alleged as of September 13, 1931, and the quantity is two ounces.

Upon his conviction the defendant was sentenced to a term of five years on each count, said sentences to run consecutively.

One Hesse (R. 3-14), a government narcotic agent, testified in substance that for a month or two prior to the arrest of Brogna and Quercia he had been purchasing drugs from Brogna. About a month and a half after the first purchase from Brogna, Hesse met Brogna by appointment. A dispute as to price arose, and Brogna left. Later on Brogna returned, accompanied by Quercia. A talk was had, during which talk the price of drugs was discussed, and Quercia left, and Brogna returned alone and delivered drugs to Hesse. The transaction was the only one in which Quercia appeared, and no drugs were actually delivered to Hesse in Quercia's presence.

Three other witnesses (R. 14, 15) testified for the government, but added nothing to the story as told by the witness Hesse.

Quercia (R. 15) testified in his own behalf and made a general denial of all the charges.

The record further states (R. 15) the foregoing is all the material evidence.

At the close of the evidence the defendant (now petitioner) presented a motion for a directed verdict (R. 15) and also requests for rulings (R. 16), which were denied, and the defendant duly excepted.

After that, the judge charged the jury (R. 17, 18), and after giving a brief charge on the function of the Court,

reasonable doubt, the indictment being no evidence, he continued as follows:

> "And I rule as a matter of law, Mr. Foreman and gentlemen, if you believe the evidence for the Government you may find him guilty under this indictment. That ruling will be excepted to by the defendant, as I understand, and the question of law thereby arising will be tested out in the upper court; but I rule, if you believe the evidence of Mr. Hesse and the others, you may find this defendant guilty on both counts. It is a question of whom you will believe.
>
> "And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.
>
> "Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.
>
> "I don't think I care to say anything else, Mr. Foreman and gentlemen.
>
> "I will save your exception, Mr. Carroll."

The jury returned a verdict of guilty on both counts, and thereafter the defendant was sentenced to imprisonment in the United States Penitentiary at Atlanta, Georgia, for a term of five years on each of the two counts of the indictment, said sentences to run consecutively, and it was ordered that he be committed until the sentences be performed. The petitioner duly filed a bill of exceptions, which was duly allowed, and thereafter prosecuted a writ of error to the Circuit Court of Appeals for the First Circuit.

The petitioner sought to reverse the conviction on the ground that he was not guilty of the sales set out in the indictment, that his motion for a directed verdict of "not guilty" was denied, that his requests for instructions were refused, and further that the District Judge exceeded his prerogative in commenting on and characterizing the defendant's testimony as "a lie," and also in substance and effect testifying himself as to a matter which nowhere appears in the testimony, and as to which there was no testimony, and which was not in issue, namely, that it was a fact that a person who wiped his hands during his testimony was lying.

The Circuit Court of Appeals, in a two-to-one opinion, the senior judge writing a dissenting opinion, affirmed the conviction.

Opinions Below.

The majority opinion of the Circuit Court of Appeals (R. 22) and the dissenting opinion (R. 24) are not yet reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on the 3d day of January, 1933. The jurisdiction of this Court is invoked under section 20A of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. That a presiding judge in a criminal case has exceeded his prerogative in instructing a jury upon the facts when he makes the following statement during his charge:

> "You may have noticed Mr. Foreman and Gentlemen that he wiped his hands during his testimony. It is rather a curious thing but that is almost always an indication of lying. Why it should be so we don't know, but

that is the fact. I think that every single word that man said except when he agreed with the Government's testimony was a lie."

2. That the presiding judge refused to charge the jury as to the essential elements of the offense charged in the indictment by refusing to give, in form or in substance, instructions seasonably requested by the defendant, or to make any allusion in his charge to the essential elements of the offense charged, which were issues in the case.

ASSIGNMENT OF ERRORS.

1. The Court erred in denying the defendant's motion for a directed verdict of not guilty, as more particularly appears in his bill of exceptions.

2. The Court erred in his charge to the jury in ruling, as a matter of law, that if the jury believed the evidence for the government, they could find the defendant guilty under the indictment.

3. The Court erred in charging the jury as follows:

"Now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie."

4. The Court erred in denying the following requests for rulings:

(1) That upon all the evidence the government has not sustained the burden of proof and the Court should direct the jury to bring in a verdict of not guilty upon all the counts of the indictment.

(2) The government offering no proof that the defendant was a dealer in narcotic drugs or that he was a person of a class of persons required to register and pay a special tax, the jury must find the defendant not guilty of the offenses alleged in all the counts of the indictment.

(3) The government having charged the defendant with selling from an unstamped package and having failed to prove that it was from an unstamped package, the jury must find the defendant not guilty on all the counts of the indictment.

(4) Upon all the evidence the government has not proved that the defendant sold, dispensed, or distributed the morphine alleged in said indictment.

5. To find the defendant guilty on this indictment the government must prove that the defendant

(*a*) Sold the narcotics;
(*b*) Dispensed the narcotics;
(*c*) Distributed the narcotics;

and having failed so to prove, the defendant must be found not guilty.

6. The evidence of the witness Hesse that all Quercia did was to discuss the price of the drug does not warrant the jury in finding that he sold, dispensed, or distributed the drug.

7. The counts specifically charge the defendant with having sold five ounces of morphine not from an original stamped package. The provision of the amended section regarding the penalties for failing to register and pay the tax applies only to those who sell from a stamped package. There being no evidence tending to prove that the morphine alleged to have been sold as charged in counts one and two was in or from an unstamped package, the defendant must be found not guilty.

Argument.

I.

The Charge to the Jury Exceeded Fair Comment.

The charge to the jury (R. 17, 18), which goes far beyond anything in the reported decisions, exceeded fair comment on the defendant's testimony and was highly prejudicial. The judge went far beyond comment on testimony or evidence and went so far as to make a statement that the defendant "wiped his hands during his testimony" and "that is almost always an indication of lying. Why it should be so, we don't know, but that is the fact." See dissenting opinion (R. 25).

This question is raised by the assignment of errors numbered 3 (R. 20) and by the exception to the charge (R. 18).

Probably nothing that can be argued by the petitioner can add much to what was said by the senior judge of the Circuit Court of Appeals of the First Circuit in his dissenting opinion (R. 24, 25), and especially where he says, after quoting the charge, that it "cannot, by any stretch of the imagination, be regarded as a fair, dispassionate statement by a judge to a jury in a criminal case." We quote this short dissenting opinion in full, as follows:

> "Bingham, J. (dissenting):
>
> The instruction of the presiding judge to the jury—'And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he *wiped his hands* during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, *but that is the fact.* I think that every single word that man said, except when he agreed with the Government's testimony, was a lie'—cannot, by any stretch of the imagination, be regarded as a fair, dispassionate statement by a judge to a jury in a crimi-

nal case. Although a presiding judge in the federal court may express his opinion on the facts, if he informs the jury that they are not bound by his opinion if they do not agree with him, nevertheless there is a limit beyond which he cannot go, and I am bound to say that the above instruction was so charged with passion and prejudice that it exceeded the bounds of fair comment, and caused a mistrial.

Furthermore, the instruction, couched as it was, was not only highly prejudicial, so far as it was an expression of opinion, but it contained a statement of fact by the presiding judge of which there was no evidence. He said: 'You may have noticed, Mr. Foreman and gentlemen, that he (the accused) wiped his hands during his testimony * * * that is almost always an *indication of lying.* Why it should be so, we don't know, *but that is the fact.*' In other words, he said: If a witness wipes his hands during his testimony, it is a fact indicative of lying. There was no evidence in the case to this effect. In making this statement the presiding judge was testifying, and his testimony was of that subtle character that was highly prejudicial. It is not the province of a federal judge to testify in his charge—that is not comment on the evidence—and when he does so and his testimony is prejudicial, it will render the trial unfair. That is what happened in this case." (Italics his.)

And to this we cannot add much except to call to the attention of this Court that, although the judge of the District Court stated "*that is the fact,*" he also stated, just before these words: "*Why* it should be so, *we don't know.*" (Italics ours.) And this clearly means that the judge was testifying to something stated by him to be "the fact" as to which he had no knowledge and assumed that the jury had no knowledge. And it is earnestly contended that, under our law, where a defendant is presumed to be innocent until

the jury finds him guilty by evidence which furnishes proof beyond a reasonable doubt, if the presumption of innocence still exists, it is prejudicial and taking away a substantial right for a judge to add his testimony to what he says is a fact, upon which no evidence has been offered.

By emphasizing the last part of Judge Bingham's opinion, the petitioner does not desire to have this Court lose sight of the earlier part of the decision, and the quoted part of the charge:

> "I think that every single word that man said, except when he agreed with the government's testimony, was a lie"—

and Judge Bingham then states that this "cannot, by any stretch of the imagination, be regarded as a fair, dispassionate statement by a judge to a jury in a criminal case." This is emphasized because of some of the decisions hereinafter cited, where judgment was reversed upon expressions in the charge not going anywhere near as far as that in the charge in the case at bar. While the petitioner recognizes that a judge may comment on the evidence, yet the petitioner contends that it cannot be held to be fair and impartial for a judge to say to a jury: "I think every single word that man said, except when he agreed with the government's testimony, was a lie."

The majority opinion of the Circuit Court of Appeals weakly attempts to justify its position by saying that, because the defendant's testimony was not printed in the record, he may very well have deserved the characterization. This is nothing more than an evasion of the issue. It appears to be nothing more than a subterfuge and a desire of the majority of the Court to gloss over an embarrassing situation, as may be seen from the statement of the majority opinion: "It is difficult to conceive of a jury accepting seriously such a standard for determining whether a witness was telling the truth."

The weakness of that statement is apparent, not only from what appears in the charge to the jury set out in the record, but also from the influence of the great weight of the judge, to "whose lightest word the jury, properly enough, gives a great weight." *Hicks* v. *United States, infra.* It is clear from the reading of the judge's charge that he meant that the jury should accept him "seriously," and there is no reason to suppose that the jury did not take him "seriously" and render a verdict accordingly.

We must assume, and the Appellate Court should have assumed, that the jury was "accepting seriously" ever word uttered by the judge in his charge, especially in the light of judicial decisions and express language as to "the great weight which attaches to intimations of opinion from the Judge," to quote the words of Judge Day, afterwards a Justice of the Supreme Court, in *Mullen* v. *United States, infra.*

It is certain that the statement of the trial judge was made with the deliberate intent to influence the jury, because the brief charge dealt only with the generalities of reasonable doubt, the indictment being no evidence against the defendant, and the presumption of innocence. Then the charge, without stating the propositions of law connected with the particular offenses charged in the indictment, and ignoring the defendant's requests for instructions, goes on to deal with the question of the defendant's veracity, and we find these words: "If you believe the evidence for the government you may find him guilty under the indictment . . . It is a question of whom you will believe." And then, feeling that the jury might not believe the government's witness, but might believe the defendant, the judge goes on to give his own expert testimony as to wiping hands being "almost always an indication of lying," although adding in the next sentence: "*Why* it should be so *we don't know but that is the fact.*" If this would not influence the jury, and prejudice the jury against the defendant, then, we submit, that there is nothing that a judge

could say to influence the jury to the prejudice of a defendant who has testified in his own behalf.

And here we have a judge giving expert testimony of the meaning of a gesture or mannerism or idiosyncracy of a witness under the nervous strain of testifying when ten years of his liberty is at stake, that such is a fact indicating lying, although the judge does not know why it should be so, and so tells the jury, and apparently assumes that the jury does not know either. This passes anything in the decided cases.

And it is fundamentally and essentially wrong to have testimony of an alleged "fact" going into the case without an opportunity for cross-examination. Of course there is no such opportunity when the evidence is closed and the testimony of the alleged "fact" comes from the judge in his charge.

The majority opinion also states: "In this case the testimony of the defendant is not printed in the record." The record states at the conclusion of the summary of the testimony of the government witnesses and the defendant: "The foregoing is all the material evidence." The defendant's full testimony by question and answer was unnecessary under Rule 8 of the Supreme Court. The rule was followed as to all the witnesses except government witness Hesse, upon whose testimony the government case was founded, because this was the only witness whose testimony in any way tended to connect the defendant with the offenses charged in the indictment.

The record states (R. 313): "The defendant testified upon his own behalf and made a general denial of all the charges." This is certainly an adequate summary of the substance of the testimony of the defendant under the rule. It would not have added to the force of the record to set forth his testimony in more detail, to say nothing of setting it forth by question and answer. The characterization objected to is chiefly objectionable because of the premise upon which the trial judge based it, namely, that he wiped his hands while

testifying, and therefore was a liar. It was not because of anything the defendant *said* while testifying, so consequently could not have appeared in the record.

The following authorities throw considerable light on how far a trial judge may go in his charge in commenting on evidence.

In England the law is:

> "1. After the close of the reply of the Counsel for the Prosecution the presiding Judge sums up the whole case and the evidence to the jury, gives his direction on the matters in issue and on the points of law applicable to these matters, and may give his opinion on such matters."
>
> Halisbury's Laws of England, vol. 9, at p. 369.

Attention is called to the case of *Rex* v. *Mason* (1932), 18 Cohens' Appeal Reports. In this case the trial Court said: "I invite you to take such and such a course." The Court of Criminal Appeals said, in quashing the conviction: "The idea of inviting a jury is suited rather to an advocate than to a judge."

In *Rex* v. *O'Donnell* (1917), 12 Cohens' Criminal Appeal Reports, 219, the Criminal Court of Appeals refused to quash the verdict on the ground that the presiding judge had not exceeded his authority, holding that a judge in directing a jury is clearly entitled to express his opinions on the facts of the case, provided he leaves the issues of the fact to the jury to determine. A judge apparently is not justified in directing a jury or using in the course of his summing up such language as leads them to think that he is directing them, and that they must find the facts in the way which he indicates.

In the United States we have the following cases:

Hicks v. *United States*, 150 U.S. 442. The defendant had

gone on the witness stand. The judge said that there was a conflict as to the material facts between his statements and the statements of the other witnesses who were telling the truth, and that the jury would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses, etc. In the majority opinion the Court said that the privilege of the defendant to testify in his own behalf "would be a vain one if the judge, to whose lightest word the jury, properly enough gives a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability."

In *Starr* v. *United States*, 153 U.S. 614, it was held "that there were limitations on the power of a Federal Court in commenting on the facts of a case, when instructing a jury, limitations inherent in and implied from the very nature of the judicial office."

In *United States* v. *Breitling*, 20 How. 252, the Court said:

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

In *Mullen* v. *United States*, 106 Fed. 895, Day, C.J., C.C.A. 6th Cir., said:

> "We do not understand the practise in the Federal Court, liberal as it is, to permit such comments outside of the testimony to go to the jury with the great weight

which attaches to intimations of opinion from the judge."

In *Weare* v. *United States*, 1 Fed. (2) 617, 619, in reversing a conviction, the Circuit Court of Appeals said:

"Examination of the language of the court in its instructions in this case leads inevitably to the conclusion that the exceptions and objections to certain parts thereof were well taken. In reading portions of the instructions, it would be difficult to tell whether one were reading the instructions of a court or the argument of a prosecutor. As a sample of their argumentative nature, we quote the following: 'As I recollect it, when these men were put in jail, one of them put in jail that day and the other one the day before, they were searched. Would such things as that match box and that tobacco can escape the observation of the investigating officer? If he had any sense at all, wouldn't he have found those things? They wouldn't have to go into a man's shoes to determine whether he had a match box on his person. If he had it in his shoe, he would have crushed it. They couldn't get that match box in his shoe. That is my view. Would these things have escaped the searching officer when he searched them before they were put in jail that day? Now, they search them when they put them in jail.'

Other remarks were made by the court equally objectionable, which it is not necessary to set out. The whole tenor of the instructions was apparently to influence the jury to return a verdict of guilty. It was a palpable attempt to usurp the function of the jury as to fact questions and to impose the will and desire of the court upon it, and to interfere with the independent judgment of the jurors. Under the Constitution one accused of crime is entitled to a determination by a jury of the fact questions involved. The jury can easily be

misled by the court. Its members are sensitive to the opinions of the court, and it is not a fair jury trial when the court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution. The government provides an officer to argue the case to the jury. That is not a part of the court's duty. He is not precluded, of course, from expressing his opinion of the facts, but he is precluded from giving a one-sided charge in the nature of an argument. We do not think the error in this case is cured by the mere statement to the jury that they were not bound by his opinion and that they should follow their own judgment."

In *Parker* v. *United States*, 2 Fed. (2) 710, in a prosecution under the Mann Act, in a *per curiam* opinion it is said:

". . . after fairly stating the conflicting claims and having referred to defendant's contention that the girl had followed him to Illinois, [the judge] charged the jury: 'If (that) is a reasonable contention to you, you are warranted in so regarding it; if you think it is an unreasonable contention, then you may or may not give it such consideration as you think proper. To me it is wholly unreasonable. I don't know how this government witness impressed you jurors. She impressed me as being a girl perhaps easily persuaded, being a girl whose environments had been such as that she might fall an easy victim to the persuasions of designing men. Now, that is simply how she impressed me, and you gentlemen are not to be influenced by my impressions concerning her. Personally I would rather believe the girl who had been wronged than the man who would desert his wife and children to wrong her; but that is another impression that is personal to me, and which you are not to regard in any way whatsoever, or for any purpose.'

> Under all the recited circumstances, we are compelled to think this portion of the charge to have the aspect of argument and advocacy beyond the permissible limit."

In *Graham* v. *United States*, 12 Fed. (2) 717, the Court said, in reversing the District Court:

> "It is however of first importance, both to the particular defendant who may be on trial and to the administration of justice generally, that everyone shall recognize that what is said from the bench is the cool and well balanced utterance of an impartial judge, and has in it naught of the heat and partisanship of the advocate."

In *Cook* v. *United States*, 14 Fed. (2) 833, a conviction was reversed where the judge said that "He gave no credence whatever to the statement of the defendant."

In *Cook* v. *United States*, 18 Fed. (2) 50, a retrial of the preceding case, it was said in the charge (p. 51):

> "It is my opinion from this testimony that these darkies told the truth about this matter. I observed this witness Nelson upon the stand, his demeanor and his manner, the partner of Mr. Cook, as he says, in the garage and gasoline and oil business. He didn't appear to me to be a frank witness; his evidence didn't appeal to me as being truthful; it didn't appeal to me that he really knew whether he could recognize his own writing or not. I have examined carefully these exhibits, but that is only an opinion of mine. You may have entirely a different one. I think they were all made out at the same time, and at the same place; that is my candid opinion about it. I believe these negroes went down there and paid this money for the purpose of which they stated, in order that they might dispense

liquor out at the parties that they had on various Saturday nights when they had them. Now, that is the way the evidence strikes me, gentlemen; but my opinion is not controlling or in any way binding upon you gentlemen. I am of the opinion that this conspiracy existed as charged in this indictment from this evidence introduced; but that is the deduction that I draw from the evidence which is in no way controlling upon you gentlemen."

In the opinion, reversing the judgment of conviction, in the closing words, it is said (p. 52):

"The argumentative nature of the part of the instructions objected to (hereinbefore set out) is apparent, and in our judgment the language amounted to an argument for the conviction of the defendant. The court did tell the jury that his opinion on the facts was not controlling upon them, but that did not in our judgment cure the error. Every one knows that suggestions from the court have great weight with a jury, and the argumentative language used in this instruction must have seemed to the jury an advocacy of the government's case, and impressed upon them the court's desire for a conviction. We think it was not such judicial discussion of the evidence as is permissible. Certainly the language is as argumentative as that used by the court in the case of Cook v. United States (C.C.A.) 14 F. (2) 833, which this court decided necessitated a reversal of the case.

For the reasons stated, the judgment must be reversed, and the cause remanded for new trial. It is so ordered."

In *Barham* v. *United States*, 14 Fed. (2) 835, 836, the same Court, reversing the conviction, says:

"Plaintiff in error argues that the comments of the court were such as to prevent the defendant from hav-

> ing a fair and impartial trial, and that the court usurped the functions of the jury. The language objected to is that in which the court stated that he drew certain inferences, and expresses the opinion that certain material facts were true, although, as the court says, 'there is no evidence of that.' It is then stated that the court not only did not believe the testimony of a deputy sheriff produced as a witness for the defense, but added that he had no respect and no regard for him, 'and my judgment is, as long as men like him wear a deputy sheriff's commission, why 15 year old girls will be at dances drinking liquor. That is my opinion of his evidence. I don't give it any credence, have no respect for it, but that is only my idea of how his evidence appeals to me. You may look at it entirely different, and that is your business, and your responsibility.'"

In *O'Shaughnessy* v. *United States,* 17 Fed. (2) 225, reversing the conviction, the Court says, at 228:

> "General statements in the charge, to the effect that the jury were at liberty to disregard the Court's views as to guilt or innocence, and to base their verdict on their own conclusions from the evidence, did not cure the fault in the charge of a lack of impartiality in submitting the evidence to the jury, or, justify the court in making one-sided recitals of evidence, or in furnishing arguments in behalf of only one side of issues as to which the evidence was conflicting."

In *Smith* v. *United States,* 18 Fed. (2) 896, where the judge made a statement that he believed a witness told the truth and proceeded to give his reasons, it was held reversible error, as being not within the limits of legitimate judicial comment.

In *Sunderland* v. *United States,* 19 Fed. (2) 202, 216, in reversing a conviction, the Court said:

> "A fair trial means that while the judge may and should direct and control the proceedings, and may exercise his right to comment on the evidence, yet he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror."

In *Spalitto* v. *United States,* 39 Fed. (2) 782, 788, in reversing the judgment of conviction, the opinion follows *Cook* v. *United States,* 18 Fed. (2) 50, 52, *supra,* quoting the language already quoted in this brief from that case.

In *Minner* v. *United States,* 57 Fed. (2) 506, in reversing the conviction, one part of the charge was as follows:

> "I also instruct you that the character or reputation of an officer of the government or of this court is not to be impugned because he does his duty. He is presumed to be an honest and conscientious officer, unless there is evidence offered to the contrary, and there was no evidence offered in this case to impeach the character or the reputation of Mr. Madden, or any of the other government officers."

As to this the Court said (p. 513):

> "To thus single out and bolster up the testimony of Madden, upon which the government's case principally depended, was improper and erroneous."

And further the Court said, with reference to the charge of the presiding judge:

> "His comments were in the nature of an argument to the jury rather than a fair and dispassionate statement of what the evidence showed and a tempered expression of his opinion as to the facts. In doing so, he assumed the role of an advocate rather than an impartial judge. That this was error is established by repeated decisions."

In the State Courts of Massachusetts exceptions have been sustained in civil cases where the attorney in argument for a party has made a statement of fact. The statement of an attorney, whose duty it is to be at least partial to his client and his client's case, could have but little effect on the jury in comparison with utterances of the judge, whose function is to instruct the jury and to give the parties a fair and impartial trial. We cite only the latest case in the reports.

In *Doherty* v. *Levine*, 278 Mass. 418, 419, in the opinion by Rugg, C.J., it is said:

> "The statement in argument by the plaintiff's attorney was entirely improper and prejudicial in nature. It was a statement of fact purporting to be on his personal knowledge or at least concerning which the inference well might be drawn that he had personal knowledge. It was a matter concerning which testimony should have been introduced if it was to be considered by the jury." (Citations.)

In Massachusetts the following cases have arisen on the right of the District Judge to comment on the defendant in his charge, and all by Judge Lowell, as follows:

Grillo v. *United States*, 26 Fed. (2) 461. In this case the Court characterized the defendant's testimony. The Circuit Court of Appeals, then made up of Anderson, Bingham, and Johnson, JJ., reversed the lower Court, and said:

> "It appears in the bill of exceptions that the court, having instructed the jury as to the law of the case, said: 'So much for the law. Now, as to the facts. It would serve no useful purpose for me to rehearse them. The defendant took the stand, and the case turns on whether you think he was telling the truth.' We think this statement was misleading. It was made at the very close of the charge. It gave the jury to understand that,

if they did not believe the defendant they could find him guilty. To so charge was a plain error of law. If the jury did not believe the defendant was telling the truth, that would not justify a verdict of guilty. They must go further and find that the defendant entered into a plan or conspiracy with other persons to bring liquor into the country without paying the customs duties and without a permit, and that some overt act was done in furtherance of the conspiracy; and they must be satisfied beyond a reasonable doubt of the proof of these facts. Although the court in the earlier part of its charge outlined what the government was required to prove to establish its case, we nevertheless think that in this parting sentence to the jury it fell far short of what it should have done, and, by so doing, may have misled the jury and excused it from performing its full duty, to the defendant's prejudice."

In *United States* v. *Cohen*, 56 Fed. (2) 28, in reversing the conviction, and quoting from the charge, at p. 30, we find the following:

"'Now this is a very simple question, and it is entirely a question of whether this man Cohen was the man who ran away from that automobile on the 14th of August, 1929. It is entirely a question of fact. Do you believe him, gentlemen? I do not; but it is entirely for you to say. That is all I care to say, gentlemen.' But the issue in the case was not whether Cohen was the man who ran away from the automobile on the 14th of August. It was whether on that date he unlawfully possessed and unlawfully transported intoxicating liquor."

In *Malaga* v. *United States*, 57 Fed. (2) 822, at 828, we find the following statement by the Court in reversing the conviction because of the judge's charge:

"But a statement of facts not in evidence, an argumentative discourse, a repeated assertion that the respondent or other witness is not telling the truth, or a direct or indirect instruction that a respondent in a criminal case is guilty, may not be sufficiently neutralized by a reminder that it is for the jury to say.

That the record before us gives a full and fair picture of what occurred in the trial below, we are reluctant to believe; but we cannot base our conclusions on conjecture, or on what probably occurred. . . .

We think a trial judge should hesitate in expressing his opinion on the guilt of a respondent in a criminal case, though he may be permitted to give his opinion on the evidentiary facts. Argumentative discussion on the effect of evidence as proof, or the inference to be drawn from the acts of witnesses, or of the respondent in a criminal case, are universally recognized as out of place from the bench.

One of the underlying principles of our jurisprudence is that the scales of justice in the trial of a cause must be held in even balance by the presiding judge. It is our pride that under our Constitution and laws a respondent in a criminal case, though guilty, is entitled to a fair and impartial trial."

All three cases were reversed, yet in the instant case, which is far stronger than any one of the three previous cases, we find the majority opinion ignoring two of the Grillo and Cohen cases and not following the Malaga case which is cited, and affirming the conviction.

The three foregoing cases show the progressive stages, from the time when the Circuit Court of Appeals for the First Circuit held as in the Grillo case, *supra,* to the instant case, of the tendency of the District Judge presiding in the criminal session in the District of Massachusetts to ignore the principles of law involved in the offenses charged, and

the necessary elements of the alleged offense to be proved to the satisfaction of the jury beyond a reasonable doubt to justify a conviction, and leave to the jury, as the principal issue to be decided by them, the question of whether or not the defendant was lying, instead of proof beyond a reasonable doubt of the essential elements of the alleged offense. The course so pursued has been insiduous, steady, and progressive, as is clearly illustrated by the charges to the jury in the Grillo case, the Cohen case, the Malaga case, all hereinbefore cited, and the instant case.

II.

The Charge to the Jury was Inadequate.

The defendant contended before the Circuit Court of Appeals, and now contends, that he was entitled to have the judge charge the jury with reference to the essential elements of the offense charged, as to which he seasonably requested specific instructions set forth in the record. The defendant was entitled to have the case submitted to the jury upon the question of whether or not they had been proved beyond a reasonable doubt, and not to have the verdict of the jury turn upon the issue of his veracity.

It is hard to state it any better than in the words of *Grillo* v. *United States, supra:*

> "It gave the jury to understand that, if they did not believe the defendant they could find him guilty. To so charge was a plain error of law. If the jury did not believe the defendant was telling the truth, that would not justify a verdict of guilty. They must go further and find that the defendant" committed the offense charged.

It may be that in the case at bar the jury did not find, and could not have found, that all the essential elements

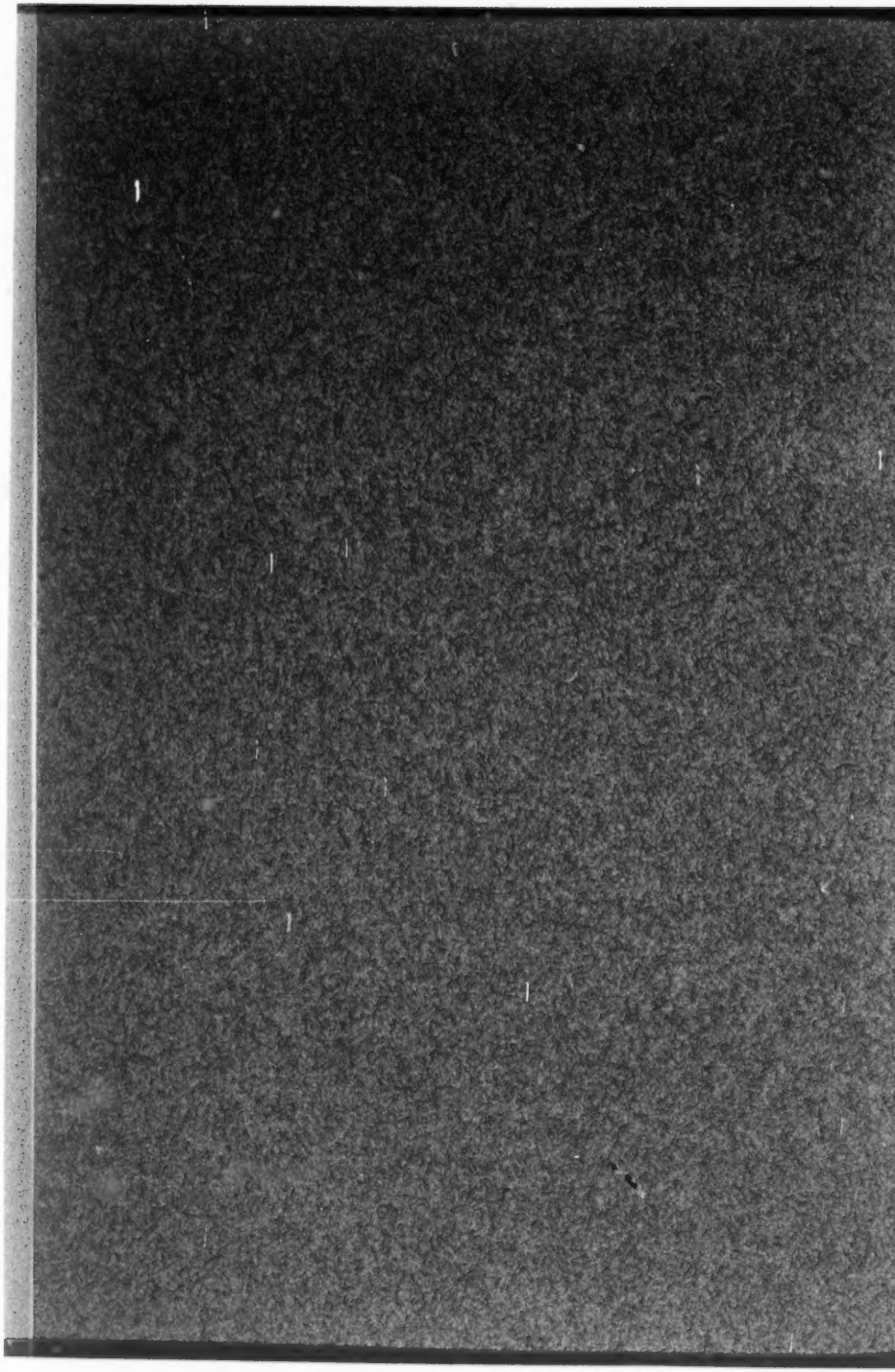
of the offense charged had been proved beyond a reasonable doubt, and may have reached their verdict because they did not believe the defendant, or may have believed that the defendant was lying because the judge said he believed the defendant was lying, and that it was an indication of lying because the defendant wiped his hands during his testimony.

Such was the law in the First Circuit in the Grillo case, *supra,* and the part of the opinion in the Grillo case hereinbefore quoted seemed to the defendant to be an irresistible argument, and it would have been, had the Grillo case been followed instead of scrapped. The Cohen case, *supra,* is an added authority, and, at the time of the decision of the Cohen case, the Grillo case was apparently being accepted as the law in the First Circuit, from the reasoning of the opinion, although not therein cited. The reasoning is along the same lines.

Conclusion.

And in conclusion it is respectfully submitted that the charge of the presiding judge, ignoring the essential elements of the offense charged, refusing pertinent requests thereto, leaving the issue to depend upon the veracity of the defendant, characterizing the testimony of the defendant as "lying," and adding his own testimony of what he stated to be "the fact" that a man who wipes his hands during his testimony is lying, although we don't know why, went far beyond fair comment, denied the defendant the fair and impartial trial to which he was entitled. And that for these reasons, more fully hereinbefore stated, supported by authorities, the judgment of the Court below should be reversed.

ESSEX S. ABBOTT,
Attorney for Petitioner.



In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 701

ANGELO QUERCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The petition in the instant case presents the question whether certain comments on the defendant's testimony made by the District Judge in the course of his charge to the jury constituted reversible error.

Petitioner concedes that in a Federal court the trial judge may express his opinion upon the evidence and may assist the jury in its deliberations by comments upon the testimony, but it is asserted that the District Judge in this case abused this important privilege.

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In the instant case District Judge Lowell, in commenting upon the defendant's testimony, said in the course of his charge to the jury (R. 16):

> You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.
>
> Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.

Petitioner contends that this comment exceeded proper bounds and constituted prejudicial error because it was founded upon facts not in evidence, and it is alleged to be a distortion of the testimony that was before the jury for its consideration. Furthermore, petitioner asserts that because of the great weight properly given by a jury to the comments of the judge on the evidence, the comment was so prejudicial to the defendant as to amount almost to a directed verdict of guilty.

The majority of the court below dismissed petitioner's objection to this portion of the charge because it considered that the jury would naturally disregard a comment of this kind and could not have taken it seriously. (R. 23.) The dissenting judge considered that the comment was so improper

as to constitute prejudicial error. (R. 24.) It is of the utmost importance that Federal courts should continue to enjoy the privilege of making proper comments upon evidence for the guidance of juries. It is equally important that this privilege should not be abused. As a serious question of abuse of the privilege is raised by petitioner and as a difference of opinion upon the subject is disclosed by the opinions below, we think that the question presented is one of sufficient importance to merit review by this Court and we do not oppose the granting of the petition for a writ of certiorari, limited to the question whether the foregoing comment of the trial judge upon the testimony constituted prejudicial error.

Attention should, however, be called to the fact that the testimony of the petitioner to which the comment of the trial judge related was not included in the bill of exceptions, and the court below was of the opinion that the petitioner's testimony might have clearly deserved the characterization given to it in the charge to the jury. (R. 23.)

The only other rulings complained of were the denial of defendant's motion for a directed verdict of not guilty; the instruction of the court that if the jury believed the evidence for the Government, they could find the defendant guilty under the indictment; and the refusal of certain requests for rulings.

The testimony for the Government, which was very brief (R. 3–13), was clearly sufficient, as both

courts found, to sustain the verdict of guilty. The jury was instructed upon the question of reasonable doubt and the presumption of innocence (R. 15–16), and then the court told the jury that if they believed the evidence for the Government, they might find the defendant guilty under the indictment (R. 16). Thus qualified by a statement of the rules as to reasonable doubt and presumption of innocence, the instruction to find guilt if the testimony was believed was, as the court below concluded (R. 22), a correct statement of the law.

The requests for rulings (R. 14) were in effect requests for peremptory instructions to acquit because of the alleged failure of the Government to prove necessary elements of the crimes charged, and the exceptions to the court's refusal to rule as requested added nothing to the exception to the denial of the defendant's motion for a directed verdict. Both courts below considered the evidence amply sufficient to support the verdict.

CONCLUSION

We do not oppose the granting of the writ of certiorari, but suggest that if certiorari is granted, review be limited to the question whether the comment of the trial judge upon the testimony constituted prejudicial error.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

MARCH, 1933.

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 701

ANGELO QUERCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury appears at R. 17–18. The opinion of the Circuit Court of Appeals (R. 22–24) is reported in 62 F. (2d) 746.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 3, 1933 (R. 26). The petition for certiorari was filed February 15, 1933, and was granted March 27, 1933 (R. 26). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the comments of the presiding judge at the trial exceeded the proper bounds of judicial comment upon the evidence and thus constituted prejudicial error.

2. Whether failure to charge all the essential elements of the offense for which petitioner was being tried constituted prejudicial error.

STATEMENT

Petitioner and one Brogna were indicted for selling, dispensing, and distributing narcotics (R. 1). At the trial, one Hesse, a Government narcotic agent, testified that he had made a number of purchases of narcotics from Brogna and that on one occasion Brogna had been accompanied by petitioner, whom Brogna introduced to him as "the main connection." On that occasion petitioner discussed the price for which he would sell narcotics and, after a bargain had been struck, said, "Give the money to Joe. Joe will bring you back your stuff. I don't want to have anything to do with you in this business. You do all your business with Joe. He will be back with the stuff." "Joe" was Brogna, the other defendant in this case, who pleaded guilty. The witness paid the money to Brogna, as arranged, and Brogna delivered the narcotics to him. (R. 3–6.)

On another occasion the same witness went to Brogna's home to consummate a sale of seven

ounces of morphine. Brogna took him to 22 Dorrance Street, Boston, near the elevated, and directed him to wait there (R. 7). On this occasion another agent (Artis) observed Brogna leave Hesse and go directly to petitioner's home which he entered, shortly thereafter leaving the premises in company with petitioner. This witness followed petitioner and Brogna, but lost track of them. The petitioner shortly thereafter met Hesse, waiting near the elevated, where he made delivery of two ounces of morphine and received payment therefor. (R. 14–15, 8.) Shortly after this delivery and sale petitioner was arrested and his home was searched. A scale for weighing morphine, and a small quantity of narcotic drugs, were found in the house, and when petitioner's person was searched he was found to have in his possession currency which by its serial numbers was identified as having been paid by the witness to Brogna for the morphine purchased from him (R. 8–9). Quercia at no time delivered any narcotics to the witness, nor was he present when Brogna delivered narcotics (R. 13, 14). The testimony of other Government agents confirmed the testimony given by Hesse (R. 14–15). Quercia testified on his own behalf and made a general denial of all the charges, but his testimony is not set forth in the record (R. 15).

At the close of the evidence the defendant made a motion for a directed verdict, which was denied

(R. 15). The defendant thereupon presented certain requests for rulings which, in substance, renewed the motion for a directed verdict, and which were also denied (R. 16–17). The court charged the jury concerning the rules as to reasonable doubt and presumption of innocence, and ruled, as a matter of law, that if the jury believed the evidence for the Government it might find the defendant guilty under the indictment. The court also stated that its expressions of opinion on the evidence were not binding on the jury and that it was the jury's duty to disregard the court's opinion if they did not agree with it. (R. 17–18.) The charge continued as follows (R. 18):

> And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.
>
> Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.

The defendant excepted generally to the charge, and particularly to the court's ruling that if the jury believed the Government's evidence it might

find the defendant guilty under the indictment; exception was also taken to the portion above quoted in which the court expressed its opinion concerning the credibility of the defendant (R. 18). The jury returned a verdict of guilty on each count of the indictment (R. 19). Upon appeal, the Circuit Court of Appeals, one judge dissenting, affirmed the judgment of the District Court (R. 26).

SUMMARY OF ARGUMENT

The function of a Federal judge in a criminal case to advise the jury upon the facts and to express his opinions concerning the credibility of witnesses and the guilt or innocence of the accused, cannot be questioned. The exercise of this judicial function in a proper case is one of the most important duties which a trial judge has to perform in a Federal court, and the concept of trial by jury embodied in the Constitution includes this function as one of its essential elements. The judge may not, however, usurp the functions of the jury, and if his instructions may fairly be said to have been coercive upon the jury in their consideration of facts determinative of their conclusion upon the question of guilt, the charge is erroneous, even though in form it is an expression of the court's opinion and the jury is told that, after all, they are to determine the facts.

We think a portion of the charge complained of in the instant case was improper, and that this

Court should determine whether it was unfair and coercive. The question is peculiarly one for the judgment of this Court, in the exercise of its supervisory control over the inferior Federal courts. We therefore submit the case without contention either that the judgment should be affirmed or that it should be reversed.

With the exception of that portion of the charge commenting upon the credibility of the defendant and his appearance upon the stand, no error appears in the instructions of the trial court.

ARGUMENT

I

The power of Federal judges to comment upon the evidence and to advise the jury concerning facts determinative of their verdict, is not disputed. Trial by jury in the courts of the United States is a trial presided over by a judge who is "not a mere moderator" but "is the governor of the trial" charged with the duty, where in his judgment the due administration of justice requires, to aid the jury by explaining and commenting upon the testimony and expressing his opinion on questions of fact, provided only he submits those questions to the jury for their determination. See *Vicksburg & Meridian R. Co.* v. *Putnam*, 118 U.S. 545, 553; *United States* v. *Philadelphia & Reading R. Co.*,

123 U.S. 113, 114.[1] No doubt this broad authority includes fair comment upon the credibility of any witness. This important function of the trial judge is derived from the common law and was recognized in England and in this country at the time the Constitution was adopted.[2] It is therefore embedded in the constitutional concept of trial by jury. See *Patton* v. *United States*, 281 U.S. 276, 288–290; *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13–14; *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95.[3] State laws forbidding the expression

[1] See also *McLanahan* v. *Universal Ins. Co.*, 1 Pet. 170, 182; *Carver* v. *Astor*, 4 Pet. 1, 80, 81; *Magniac* v. *Thomson*, 7 Pet. 346, 390; *Tracy* v. *Swartwout*, 10 Pet. 80, 96; *Games* v. *Dunn*, 14 Pet. 322, 327; *Mitchell* v. *Harmony*, 13 How. 115, 131; *Transportation Line* v. *Hope*, 95 U.S. 297, 302; *Rucker* v. *Wheeler*, 127 U.S. 85, 93; *Lovejoy* v. *United States*, 128 U.S. 171; *Baltimore & Potomac R. Co.* v. *Fifth Baptist Church*, 137 U.S. 568, 574; *Simmons* v. *United States*, 142 U.S. 148; *Doyle* v. *Union Pacific R. Co.*, 147 U.S. 413, 430; *Lincoln* v. *Power*, 151 U.S. 436, 442; *Allis* v. *United States*, 155 U.S. 117, 123; *Wiborg* v. *United States*, 163 U.S. 632, 656; *Graham* v. *United States*, 231 U.S. 474, 480; *Crowell* v. *Benson*, 285 U.S. 22, 61.

[2] See Sir Matthew Hale, *Common Law of England* (6th ed.), 346, 353; 3 *Bl. Comm.*, 375; *Solarte* v. *Melville*, 7 Barn. & Cress. 430; *Davidson* v. *Stanley*, 2 Man. & Gr. 721; *Taylor* v. *Ashton*, 11 M. & W. 401. See also *State* v. *Bennett*, 3 Brev. (S.C.) 514; *Bigelow* v. *Timmerman*, 12 Wend. (N.Y.) 299; *People* v. *White*, 14 Wend. (N.Y.) 111, 116; *Donnelly* v. *State*, 26 N.J.L. 463, 479–480; *Kilpatrick* v. *Commonwealth*, 31 Pa. St. 198, 216; *Commonwealth* v. *Burk*, 81 Mass. 404, 406.

[3] Despite the declarations of this Court that the power of Federal judges to comment upon testimony and evidence adduced before them is an essential factor in the process of

of the judge's opinion upon the facts in trials by jury are not binding upon the Federal courts.[4] *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 94;

trial by jury for which the Constitution provides, proposals to prohibit the Federal judges from expressing their opinions on the facts have frequently been introduced in Congress. See, for example, *72d Cong., 1st Sess.*: S. 640, referred to Judiciary Committee but not reported; *71st Cong., 1st Sess.*: S. 374, referred to Judiciary Committee but not reported; *70th Cong., 1st Sess.*: S. 1094, referred to Judiciary Committee and reported out favorably (S.Rep. 93), passed Senate as amended, March 19, 1928, referred to House Judiciary Committee and not reported out; *69th Cong., 1st Sess.*: S. 455, referred to Judiciary Committee and reported out favorably (S.Rep. 842); S. 712, referred to Judiciary Committee but not reported; H.R. 3918, referred to Judiciary Committee but not reported; *68th Cong., 1st Sess.*: S. 624, amended and passed by Senate and reported favorably by House Judiciary Committee (H.Rep. 816); H.R. 3260, amended and reported favorably by House Judiciary Committee (H.Rep. 365); H.R. 2910, H.R. 4509, and H.R. 4821, all referred to Judiciary Committee but not reported out; *67th Cong., 1st Sess.*: S. 400, referred to Judiciary Committee but not reported; *66th Cong., 1st Sess.*: S. 228, referred to Judiciary Committee but not reported; *65th Cong., 2d Sess.*: H.R. 9354, reported favorably by House Judiciary Committee (H.Rep. 284); *64th Cong., 1st Sess.*: S. 1412, Sec. 164, referred to Judiciary Committee but not reported; *63d Cong., 1st Sess.*: S. 389, referred to Judiciary Committee but not reported; H.R. 2487, referred to Judiciary Committee but not reported; *62d Cong., 3d Sess.*: S. 8007, referred to Judiciary Committee but not reported; *60th Cong., 1st Sess.*: H.R. 12441, referred to Judiciary Committee but not reported; *59th Cong., 1st Sess.*: H.R. 7611, referred to Judiciary Committee but not reported.

[4] As early as 1796 Tennessee had provided in its constitution that judges could not "charge juries with respect to matters of fact" (Constitution of 1796, Art. 5, Sec. 5), and

Gasoline Products Co. v. *Champlin Co.*, 283 U.S. 494, 498; *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, 376–377, 397; *St. Louis, Iron Mt. & Southern Ry. Co.* v. *Vickers*, 122 U.S. 360, 363; *Vicksburg & Meridian R. Co.* v. *Putnam*, 118 U.S. 545, 553; *Nudd* v. *Burrows*, 91 U.S. 426.

This prerogative of the trial judge, resting as it does upon constitutional guaranties, is beyond the control of the Congress and of the State Legislatures. But this does not mean that it is a power unregulated and uncontrolled in its exercise. Indeed, the Circuit Courts of Appeals and this Court have been extremely sensitive to any claim that this power has been abused and in every case the comments of the trial judge are open to the most careful scrutiny and review. This case presents such a question.

The constitutional authority of the trial judge to analyze and classify the evidence and to aid the jury by giving them the benefit of the court's views on controverted questions of fact is not drawn into question in this case. Petitioner's contention is solely that the power was abused and that prejudicial error was committed by the judge in the instant case.

In his charge to the jury the District Judge, after instructing the jury that if they believed the evi-

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many States have since enacted specific prohibitions against the expression of opinions on the testimony by trial judges. See Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 Mich. L. Rev. 302, 307, *et seq.*

dence for the Government they might find the defendant guilty, said (R. 18):

> And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.
>
> Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.

The majority of the court below dismissed petitioner's objection to this portion of the charge, because it considered that the jury would naturally disregard a comment of this kind and could not have taken it seriously (R. 24). The court was further of the opinion that since the testimony of the defendant to which the trial judge referred was not printed in the record, the defendant might have deserved the characterization and hence could not have been prejudiced by the judge's remarks (R. 24).

The permissible limits of comment by trial judges have been fairly well defined by numerous decisions in the Federal courts. While each case must, in final analysis, be determined by reference to the

particular circumstances involved (*Stokes* v. *United States,* 264 Fed. 18, 25 (C.C.A. 8th)), the principle running through all the decisions is that the ultimate decision of the facts upon which guilt or innocence rests must be left to the decision of the jury. The opinion has been expressed that though forceful, unfair, or irrelevant statements by the presiding judge are to be deprecated, they do not constitute reversible error if the jury is told in terms that the statement is but an opinion and must give way if found to be in conflict with the convictions of the jurors. See *Lincoln* v. *Power,* 151 U.S. 436, 442; *Morse* v. *United States,* 255 Fed. 681, 682 (C.C.A. 4th); cf. *Buchanan* v. *United States,* 15 F. (2d) 496, 498 (C.C.A. 8th); *Chafin* v. *United States,* 5 F. (2d) 592, 596 (C.C.A. 4th), certiorari denied, 269 U.S. 552; *Tuckerman* v. *United States,* 291 Fed. 958, 964–965 (C.C.A. 6th), certiorari denied, 263 U.S. 716. This is the general rule, but in view of the fact that the jury is readily swayed by expressions of the court's opinion concerning the facts in any particular case, mere explanations that the opinion of the judge is not binding on the jury have under varying circumstances been held inadequate to counteract the influence of unwarranted statements from the bench. See *Starr* v. *United States,* 153 U.S. 614, 624 *et seq.; Hicks* v. *United States,* 150 U.S. 442, 452; *Parker* v. *United States,* 2 F. (2d) 710, 711 (C.C.A. 6th); *Sandals* v. *United*

States, 213 Fed. 569, 576 (C.C.A. 6th); *Cook* v. *United States,* 14 F. (2d) 833, 834 (C.C.A. 8th).

The rule that a mere formal declaration of the functions of court and jury may not be sufficient to erase the coercive effect of what has gone before, has found expression where the trial judge, abandoning dispassionate analysis and examination designed to assist the jury in arriving at its own decision, tinctured his charge with advocacy to persuade or coerce the jury to adopt his views. *Minner* v. *United States,* 57 F. (2d) 506, 513 (C.C.A. 10th); *Leslie* v. *United States,* 43 F. (2d) 288 (C.C.A. 10th); *O'Shaughnessy* v. *United States,* 17 F. (2d) 225, 228 (C.C.A. 5th); *Barham* v. *United States,* 14 F. (2d) 835, 836 (C.C.A. 8th); *Carney* v. *United States,* 295 Fed. 606 (C.C.A. 9th). In short, it is settled that the trial court's opinion may properly be expressed and the evidence may be made the subject of comment only when the ultimate decision is clearly left to the jury and when the expression is so free from the distortion of advocacy as to insure that the judgment of the jury will not be coerced.[6] See *Malaga* v. *United*

[6] In some instances "expression of opinion" has been so unguarded as to amount to an instructed verdict of guilty. In such cases, as here, the objection is that the province of the jury has been invaded, though in form the comments of the court were not binding instructions. See *Dinger* v. *United States,* 28 F. (2d) 548 (C.C.A. 8th); *La Rosa* v. *United States,* 15 F. (2d) 479 (C.C.A. 4th). See also *Weare* v. *United States,* 1 F. (2d) 617 (C.C.A. 8th). Cf. *Vecchio* v. *United States,* 53 F. (2d) 628, 631–632 (C.C.A. 8th).

States, 57 F. (2d) 822 (C.C.A. 1st); *Hunter* v. *United States,* 62 F. (2d) 217, 220 (C.C.A. 5th); *Cook* v. *United States,* 18 F. (2d) 50 (C.C.A. 8th). Cf. *Lemmons* v. *United States,* 62 F. (2d) 608 (C.C.A. 10th); *Morris* v. *United States,* 19 F. (2d) 131 (C.C.A. 8th), certiorari denied, 275 U.S. 543.

The comment of the judge should, of course, be limited to the facts in evidence and no distortion or alteration of the facts, under the guise of stating the opinion of the court, may be permitted. Thus, in *Hickory* v. *United States,* 160 U.S. 408, the judge, commenting upon the fact that the defendant had fled following the commission of a crime of which he was charged, told the jury that the wicked flee after a crime, but that the innocent do not. This expression of opinion that no innocent person would be tempted to absent himself or to resort to concealment was held by this Court to be in effect a charge that all persons who did so were guilty, a conclusion unsupported by any evidence, and a distortion of the actual facts that had been presented on the trial. Similarly, in *Allison* v. *United States,* 160 U.S. 203, 209, the judge instructed the jury that before acquitting the defendant, who had pleaded self-defense, they should have something more tangible than the defendant's own recital of the facts upon which his defense was based. The court remarked that "All men would say that", referring to the defendant's story of self-defense. This comment was held to be erroneous

and the judgment was reversed. In *Mullen* v. *United States,* 106 Fed. 892 (C.C.A. 6th), the court, composed of Lurton, Day, and Severens, JJ., held erroneous an intimation by the trial judge to the jury that he believed the defendants were not of good character, though in fact there was no evidence of character in the case. Although the judge added that the jury was not bound by his comments, the court held that a Federal judge could express no opinion upon facts except when the opinion was based upon evidence before the jury. In *Kolp* v. *United States,* 2 F. (2d) 953 (C.C.A. 6th), the relative credibility of witnesses for the Government and for the defense was of determinative importance. In ordering a new trial, the appellate court said (p. 954):

> Any opinion that he (the trial judge) may express should be based upon more than mere impressions. To state that "personally I am inclined to believe practically all of them (defendants' witnesses) were engaged in the business [liquor] out there", when there was no evidence in the case on which to base such a belief, is an invitation to the jury likewise to base their conclusions, not upon the testimony, or the witnesses' appearance and manner of testifying, or their apparent interest or bias, but upon impressions and surmises. In this and other respects the charge appears to us to have more of the aspect of argument and advocacy than is permissible.

Cf. *Ward* v. *United States,* 4 F. (2d) 772 (C.C.A. 9th); *Russell* v. *United States,* 12 F. (2d) 683, 692 (C.C.A. 6th), certiorari denied, 273 U.S. 708.

It is a matter of the gravest importance to the fair administration of justice in the Federal courts that the authority of the trial judge as the governor of the trial charged with the duty of aiding the jury in determining the guilt or innocence of the accused, should not be abused by any attempt to impose upon the jury the personal convictions of the judge, however well founded such convictions may be. In this case the vigorous, unqualified, and intemperate expressions of the judge's conviction that "every single word that man (the defendant) said, except when he agreed with the Government's testimony, was a lie", must have had a profound effect upon the members of the jury. The bald assertion that wiping one's hands on the witness stand was almost always an indication of lying, reinforced by the statement from the judge's experience, "Why it should be so we don't know, but that is the fact", followed by the conclusion that every word the man uttered was a lie except when he agreed with the Government's testimony, may well have been accepted by the jury as a judgment, predicated upon years of observation and experience upon the bench, entitled to profound respect and not to be rejected in considering the defendant's only defense, which was founded upon his denial of the testimony of two agents of the Government.

The full force of the judge's observations fell upon the issue of the credibility of the defendant. The opinion itself was founded, if at all, upon facts not in evidence and there is no indication of its inherent probability or accuracy.

The defendant was a witness in his own behalf and, so far as appears from the record, his credibility had not been attacked by the Government. The issue whether he was to be believed was for the jury; and the instruction amounted to a statement of fact unsupported by evidence which, in all probability, operated to withdraw from the jury consideration of a question which should have been left solely to their decision. See *Smith* v. *United States*, 161 U.S. 85, 90; cf. *Reagan* v. *United States*, 157 U.S. 301, 305.

It was said in *Rudd* v. *United States*, 173 Fed. 912, 914 (C.C.A. 8th):

> We do not mean to impair in any degree the right of a trial court in both civil and criminal cases to comment upon the facts, to express its opinion upon them, and to sum up the evidence, for that is one of the most valuable features of the practice in the courts of the United States. A judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done. But his comments upon the facts should be judicial and dispassionate, and so carefully guarded that

> the jurors, who are the triers of them, may be left free to exercise their independent judgment.

This important function will be unimpaired so long as it is not abused, and it is for this Court to say whether in this case the court deprived the defendant of that fair and impartial trial of the issues by a jury to which he was entitled under the Constitution.

II

Petitioner contends that the trial court erred in instructing the jury that if they believed the evidence for the Government, they could find the defendant guilty under the indictment; and in refusing certain requests for rulings by the defendant.

The jury was instructed upon the question of reasonable doubt and presumption of innocence (R. 17), and then the court told the jury that if they believed the evidence for the Government, they might find the defendant guilty under the indictment (R. 18). Thus qualified by a statement of the rules as to reasonable doubt and presumption of innocence, the instruction that the jury might find guilt if the testimony was believed was, as the court below concluded, a correct statement of the law.[7] The testimony of the Government witnesses

[7] While we believe that the decision of the court below on this branch of the case is unquestionably correct, it may be added that the defendant's objection to this portion of

comprehended all elements of the crime for which the defendant was being tried, and the language now complained of "amounted to no more than advising the jury of what, under the evidence presented, would be sufficient to justfy a verdict." See *Wishart* v. *United States,* 29 F. (2d) 103, 105 (C.C.A 8th). See also *Horning* v. *District of Columbia,* 254 U.S. 135, 138; cf. *Transportation Line* v. *Hope,* 95 U.S. 297, 302.

The requests for rulings (R. 16–17) were in effect requests for peremptory instructions to acquit because of the alleged failure of the Government to prove necessary elements of the crimes charged, and the exceptions to the court's refusal to rule as requested added nothing to the exception to the denial of the defendant's earlier motion for a directed verdict. The evidence was found sufficient by the jury and by both courts below and, in the absence of exceptional circumstances altogether lacking here, there is no reason for further inquiry by this Court into the sufficiency of the evidence to sustain the conviction. See *Burton* v. *United States,* 202 U.S. 344, 373. Passing on a motion for

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the charge, being a mere general exception without specification of the precise reasons underlying it (R. 18), was not sufficient to bring to the attention of the trial court the alleged error in the charge. The purpose of an exception is to enable the judge to correct errors by making specific reference to the asserted ground of complaint. The objection in this instance failed to fulfill that function. See *Burns* v. *United States,* 274 U.S. 328, 336; *Thiede* v. *Utah,* 159 U.S. 510, 521.

a directed verdict of acquittal or the equivalent of such a motion, the trial court must take the view of the evidence most favorable to the Government. See *O'Brien* v. *United States,* 51 F. (2d) 674, 676 (C.C.A. 7th); *Rendleman* v. *United States,* 38 F. (2d) 779 (C.C.A. 9th); *Zottarelli* v. *United States,* 20 F. (2d) 795, 796 (C.C.A. 6th), certiorari denied, 275 U.S. 571; *Felder* v. *United States,* 9 F. (2d) 872, 875 (C.C.A. 2d), certiorari denied, 270 U.S. 648. Since there was substantial evidence to support the verdict, the giving of the requested instructions would have constituted error. See *Pierce* v. *United States,* 252 U.S. 239, 251; *McLendon* v. *United States,* 14 F. (2d) 12, 15–16 (C.C.A. 5th), certiorari denied, 273 U.S. 729. Petitioner has no valid complaint concerning the rulings of the court in this respect.

CONCLUSION

We submit the case for decision without contending either for affirmance or reversal of the judgment of conviction, believing, however, that the charge of the court was improper and that this Court should consider whether it was unfair and coercive.

Respectfully submitted.

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MAY 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

No. 701.—October Term, 1932.

Angelo Quercia, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[May 29, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner was convicted of violating the Narcotic Act. 26 U. S. C., 692, 705. The conviction was affirmed by the Circuit Court of Appeals (62 F. (2d) 746), and this Court granted certiorari. 288 U. S. —.

Reversal is sought upon the ground that the instructions of the trial court to the jury exceeded the bounds of fair comment and constituted prejudicial error. After testimony by agents of the Government in support of the indictment, defendant testified, making a general denial of all charges. His testimony is not set forth in the record. Defendant's motion for a direction of verdict and requests for rulings substantially to the same effect were denied. The court instructed the jury concerning the rules as to presumption of innocence and reasonable doubt, and stated generally that its expression of opinion on the evidence was not binding on the jury and that it was their duty to disregard the court's opinion as to the facts if the jury did not agree with it. The court ruled as matter of law that if the jury believed the evidence for the Government it might find the defendant guilty. The court then charged the jury as follows:

"And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.

"Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty".

To this charge the defendant excepted.

In a trial by jury in a Federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 95. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. *Carver* v. *Jackson*, 4 Pet. 1, 80; *Vicksburg & Meridian R. R. Co.* v. *Putnam*, 118 U. S. 545, 553; *United States* v. *Philadelphia & Reading R. R. Co.*, 123 U. S. 113, 114; *Capital Traction Co.* v. *Hoff*, 174 U. S. 1, 13, 14; *Patton* v. *United States*, 281 U. S. 276, 288. Sir Matthew Hale thus described the function of the trial judge at common law: "Herein he is able, in matters of law emerging upon the evidence, to direct them; and also, in matters of fact to give them a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matter of fact; which is a great advantage and light to laymen". Hale, History of the Common Law, 291, 292. Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the Federal courts. *Vicksburg & Meridian R. R. Co.* v. *Putnam, supra; St. Louis, I. M. & S. Rwy. Co.* v. *Vickers*, 122 U. S. 360, 363; *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, 397; *Herron* v. *Southern Pacific Co., supra; Gasoline Products Co.* v. *Champlin Co.*, 283 U. S. 494, 498.

This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the

jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling". This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence "should be so given as not to mislead, and especially that it should not be one-sided"; that "deductions and theories not warranted by the evidence should be studiously avoided." *Starr* v. *United States*, 153 U. S. 614, 626; *Hickory* v. *United States*, 160 U. S. 408, 421-423. He may not charge the jury "upon a supposed or conjectural state of facts, of which no evidence has been offered". *United States* v. *Breitling*, 20 How. 252, 254, 255. It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf. *Hicks* v. *United States*, 150 U. S. 442, 452; *Allison* v. *United States*, 160 U. S. 203, 207, 209, 210. Thus, a statement in a charge to the jury that "no one who was conscious of innocence would resort to concealment," was regarded as tantamount to saying "that all men who did so were necessarily guilty", and as magnifying and distorting "the proving power of the facts on the subject of the concealment". *Hickory* v. *United States*, *supra*. And the further charge that the proposition that "the wicked flee, when no man pursueth, but the innocent are as bold as a lion", was "a self-evident proposition" which the jury could "take as an axiom and apply it" to the case in hand, was virtually an instruction that flight was conclusive proof of guilt. Such a charge "put every deduction which could be drawn against the accused from the proof of concealment and flight, and omitted or obscured the converse aspect;" it "deprived the jury of the light requisite to safely use these facts as means to the ascertainment of truth". *Id.* So where the trial judge, in referring to the defendant's story of self-defense, said—"All men would say that. No man created would say otherwise when confronted with such circumstances", this Court held that the comment practically deprived the defendant of the benefit of his testimony. "It was for the jury to test the credibility of the defendant as a witness, giving his testimony such weight under all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by the law". *Allison* v. *United States*,

supra. Similarly, where no testimony had been offered as to the previous character of the accused, it was prejudicial error for the trial court to comment unfavorably upon his general character. *Mullen* v. *United States*, 106 Fed. 892, 895, per Day, C. J. See, also, *Parker* v. *United States*, 2 F. (2d) 710, 711; *O'Shaughnessy* v. *United States*, 17 F. (2d) 225, 228; *Cook* v. *United States*, 18 F. (2d) 50; *Malaga* v. *United States*, 57 F. (2d) 822.

In the instant case, the trial judge did not analyze the evidence; he added to it, and he based his instruction upon his own addition. Dealing with a mere mannerism of the accused in giving his testimony, the judge put his own experience, with all the weight that could be attached to it, in the scale against the accused. He told the jury that "wiping" one's hands while testifying was "almost always an indication of lying". Why it should be so, he was unable to say, but it was "the fact". He did not review the evidence to assist the jury in reaching the truth, but in a sweeping denunciation repudiated as a lie all that the accused had said in his own behalf which conflicted with the statements of the Government's witnesses. This was error and we cannot doubt that it was highly prejudicial.

Nor do we think that the error was cured by the statement of the trial judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it they should find the defendant not guilty. His definite and concrete assertion of fact, which he had made with all the persuasiveness of judicial utterance, as to the basis of his opinion, was not withdrawn. His characterization of the manner and testimony of the accused was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence. *Starr* v. *United States*, *supra*; *Mullen* v. *United States*, *supra*; *Wallace* v. *United States*, 291 Fed. 972, 974; *Parker* v. *United States*, *supra*; *O'Shaughnessy* v. *United States*, *supra*; *Leslie* v. *United States*, 43 F. (2d) 288, 289.

The judgment must be reversed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.